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GENERAL INDEX

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ERRATA.

In page 150,		line 23,	*for*	Summary of trial	*read*	Summary trial.
"	"	" 25	"	Ofience	"	Offence.
"	35 (of Acts)	" 16	"	9th July	"	3rd November.

ACTS PASSED IN 1880

[By the Governor-General in Council]

AND

Noted in this Volume.

(Separate paging.)

* This mark shows that the Act has been printed in full in this Volume.

ACT XIV OF 1880.

THE CENSUS ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 3rd November* 1880.]

This Act provides for the taking of a census of British India. It contains 13 sections. S. 8 makes every person bound to answer all questions asked to him by any Census-officer, with this proviso : that no person shall be bound to state the name of any female member of his household, and that no woman shall be bound to state the name of her husband. S. 13 enacts that census records shall not be evidence in any civil proceeding or any proceeding under Chap. XL or XLI of the Criminal Procedure or Chap. XVIII of the Presidency Magistrate's Act.—*Ed., L. C.*

ACT XV OF 1880.

THE BOMBAY REVENUE JURISDICTION ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 9th July* 1880.]

AN ACT TO AMEND THE BOMBAY REVENUE JURISDICTION ACT, 1876.

Preamble.

WHEREAS it is expedient to amend the Bombay Revenue Jurisdiction Act, 1876, in manner hereinafter appearing, and to make further provision for the recovery of certain advances made in the territories administered by the Governor of Bombay in Council for purposes other than those specified in the Land Improvement Act, 1871; it is hereby enacted as follows :—

Short title. Commencement.

1. This Act may be called "The Bombay Revenue Jurisdiction Act, 1880;" and it shall come into force at once.

Repeal of ss. 8, 9, 10 and 17 of Act No. X of 1876.

2. Sections eight, nine, ten and seventeen of the said Bombay Revenue Jurisdiction Act, 1876, are hereby repealed :

Provided that the repeal hereby effected, of the first clause of the said section seventeen, shall not operate in any Scheduled District unless and until the Bombay Land-revenue Code, 1879, has been extended to such district :

Provided also that the repeal of the second clause of the said section seventeen shall not be deemed to render invalid or illegal anything made valid or legal by such clause.

3. To section thirty-two of the Bombay Civil Courts Act, No. XIV of 1869, as amended by section fifteen of the said Bombay Revenue Jurisdiction Act, 1876, the following words shall be added :—

Addition to s. 32 of Act No. XIV of 1869 as amended by s. 15 of Act No. X of 1876.

"Provided that nothing in this section shall be deemed to apply to any suit merely because—

Proviso.

"(a) a municipal corporation constituted under Bombay Act No. VI of 1873, or any other enactment for the time being in force, is a party to such suit and an officer of Government is in his official capacity a member of such corporation, or

"(b) an officer of a Court appointed under the Code of Civil Procedure, s. 456, last paragraph, or selected under Act No. XX of 1864 (*for making better provision for the care of the persons and property of minors in the Presidency of Bombay*), s. 9, is, in virtue of such appointment or selection, a party to such suit."

4. The Governor of Bombay in Council may, from time to time, with the previous sanction of the Governor-General in Council, prescribe rules as to advances to be made in the territories administered by the said Governor in Council to holders (as defined in s. 3 (11) of the Bombay Land-revenue Code, 1879) of arable land, for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Act, 1871, but connected with agricultural objects

Governor in Council to make rules as to certain advances for purposes other than those specified in Act No. XXVI of 1871.

All such rules shall be published in the local official Gazette.

5. Every advance for any such purpose which may heretofore have been made by or on behalf of the Government in the said territories, and every advance which may hereafter be made under such rules, shall, when it becomes due, be recoverable, with the interest (if any) accrued due thereon, from the person to whom such advance was made, or from any person who has become surety for the repayment thereof, as if it were an arrear of land-revenue due by the person to whom the advance was made or by his surety.

Recovery of such advances.

PRIVY COUNCIL.

The 17th and 18th July 1854.

Present:

The Lord Justice Knight Bruce, Sir Edward Ryan, the Lord Justice Turner, and Sir John Patteson.

Gopeekrist Gosain, *Appellant,*
versus
Gungapersaud Gosain,* *Respondent.*

Benamee transactions—Onus.

In questions of *benamee* transactions, the criterion is to consider from what source the money comes with which the purchase-money is paid, the onus of proof is on him who contends that the *primâ facie* nature of a transaction is not the real nature.

The question raised by the suit in the Court below, and by the appeal, being, whether a certain talook which was purchased by Rogoram Gosain many years before his death, and previously to the birth of his son, the appellant, in the name of his son, the respondent, did or did not at the time of his death form part of the real estate of Rogoram, so as to pass to the appellant and respondent jointly.

The Lord Justice Knight Bruce:—

In this appeal two questions of importance arise, one of fact, material only to the particular parties to this litigation; the other of law, interesting, not only to them, but to society at large among the natives of India, at least among the natives of Bengal. The questions arise in this way: A wealthy native of the name of Rogoram Gosain, employed as a Banian, at Calcutta, and having also mercantile concerns of his own, made at different periods of his life purchases of immoveable property in other names than his own; some of these purchases being made in the names of his sons, and some in the name of his son-in-law and of his brother. It is very much the habit in India to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as "*Benamee* transactions;" * * * * * . The law upon this subject was recognized by the Judicial Committee, 1843, in the case of *Dharm Dass Pandey* vs. *Mussamut Sama Soondri Debea* (3 Moore's Ind. Ap. Cases, 229), where Lord Campbell, in declaring the opinion of the

* 6 Moore's Indian Appeals, p. 53.

Court, at page 240, says, "we have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan (whose most valuable assistance we have in this case, and it gives me a confidence that I should not otherwise have felt), that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore, I think, that so far on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property."

It is clear, and their Lordships are confirmed by the opinion of Sir Edward Ryan, that the knowledge and assent of the person in whose name the purchase is made, is immaterial: to repeat the language of Lord Campbell, the criterion is, the quarter from which the money comes, and in the greater number of instances of *benamee* purchases, they are made in the names of persons ignorant at the time of their being so made. In the present instance, there is no question, but that all the money was provided by Rogoram Gosain; that is, indisputable. I do not allude now to whether the money was the joint property of Rogoram Gosain and his brother. It is clear, it was not the money of the individual in whose name the purchase was effected. If then the person in whose name the purchase was effected had been a stranger in blood, or only a distant relative, no question could have arisen; he would have been *primâ facie* a trustee, and if he desired to contend that the *primâ facie* character of the transaction was not its real character, the burthen would have rested on him; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was; and it has been contended that that circumstance changes the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son; that the presumption is advancement, and that, therefore, the burthen of proof is shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian Law, no distinct case, or *dictum*, establishing or recognising such a principle or such a rule. It is clear that in the case of a stranger the presumption is in favour of its being a *benamee* transaction, that is, a trust; but it is clear also that in this country, where the person in whose name the purchase is made, is one for whom the party making

the purchase was under an obligation to provide, the case is different, and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *propri juris*. Probable, as it may be, that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house, and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in India, there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there are more sons than one; but if the objection exists, it does not become less where there is only one son, for the father may have others; and in such a case the same objectionable consequences would follow as where several sons were in being. The note on this subject is clearly stated in W. H. Macnaghten's "Principles of Hindu Law," which, we learn from Sir Edward Ryan, is cited as an authority in the Courts of Bengal. In the first volume, p. 2, he says, "The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, &c., &c." * * * * * *

It is their Lordships' opinion, therefore, that notwithstanding the respondent was the only son of Rogoram Gosain when the purchase was made, the objection in point of morality and of religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed; it forms an objection against importing into the Hindoo Law that rule of positive law which exists in England. I have omitted to observe that *benamee* purchases in

the names of children, without any intention of advancement, are frequent in India; that is, recognised in many cases, and, among others, in that of *Amaree Tewaree* vs. *Rai Raghoo Ban Suhai* (3 Ben. Sad. Dew. Rep., 366), where may be found this statement: "The present case does not appear to be at all of a nature with those *Benamee* transactions which are prohibited by the Regulations, as Sheo Suhai in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country against which the prohibitory enactment was never intended to apply."

Their Lordships are, therefore, satisfied that according to the law by which this case must be governed, the presumption in favour of its being a *Benamee* transaction is different from that which would have existed by the law of England. It is, therefore, upon this point of view, that their Lordships must look at the evidence, and to this test it must be submitted. In this case, it is on the respondent to prove whether what was *primâ facie* the nature of the transaction, was really not so. It might, of course, be a very different thing if the burthen of proof were the other way, and the appellant had to show the opposite state of the case. Now, the Supreme Court, without saying it, has held that the presumption was not against the respondent, and has certainly not held that it was in favor of the appellant, and this is a position of law on which their Lordships find themselves compelled to differ from the able judgment under review. * * * * * *

CALCUTTA HIGH COURT.

THE 23RD APRIL 1879.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

DURJAN MAHTON* and others *versus* WAJID HOSSIEN and others.

Beng. Act VIII of 1869, *s.* 53—*Ejectment—Right to standing crops on land.*

The effect of an order of ejectment under s. 53 of the Rent Act is to dispossess the ryots, not only of the land, but also of the crop standing thereon, the object of such an ejectment being, to terminate completely the connection between the parties as landlord and tenant.

Ainslie, J. (*Broughton, J.*, concurring). In delivering judgment observed:—The proceedings of the Deputy Magistrate have, no doubt, been very irregular, but it appears to us that the result arrived at is that which he must have arrived at if he had acted according to the law.

The dispute in this case arose, in respect of certain property

* *Vide* I. L. R., 5 Calc., 135.

which admittedly was in the possession of the ryots up to a certain date; and which was claimed by Wajid Hossien and others as having been transferred to them by the execution of a decree for ejectment under the Rent Law on the 18th of November 1878. Both the parties refer to the same decree, one as showing his right to both crop and land, and the other as showing that the Zemindars were entitled to the land only, and not to the crop. When, therefore, it became necessary for the Deputy Magistrate to consider what steps he should take to prevent any breach of the peace, it clearly was necessary for him to come to some determination as to the effect of the Munsiff's decree, which both parties put forward as conclusively establishing their respective rights. If he was of opinion that the evidence before him showed that a breach of the peace was likely to occur, he would have to give effect to his decision in regard to the effect of the execution under the decree, by binding over the party whom he considered to be wrongfully putting forward a claim to the property, in recognizance not to commit a breach of the peace. The practical effect of the recognizance would, no doubt, have been, to give the crop to one or other of the contending parties.

Instead of making the order in this form, he unfortunately allowed the police to interfere with cutting and carrying away of the crop, and having got it into his own custody, it became necessary for him to get rid of it.

The order to cut the crop, and subsequently to make it over to one of the parties, was not an order warranted by the Code of Criminal Procedure, but the effect of it was the same as if he had bound down the ryots under s. 491, or restrained them from interfering with the crop under s. 518.

The Judge is of opinion that in this case the Deputy Magistrate has encroached upon the functions of the Civil Court, and that he has, instead of allowing the Civil Court to execute its own decree, proceeded to execute it after consulting with the police. This in our opinion is not quite a correct statement of what occurred. However irregular the proceedings of the Deputy Magistrate may have been in form, it clearly was necessary for him to come to a decision as to the effect of the decree of the Civil Court. The steps he took for arriving at that decision were, however, improper. If he had any doubt as to the intention of the Court executing the decree, the proper course for him was to consult the Court itself, and not to make enquiries as to the effect of the execution of the decree from the

police. But although his mode of arriving at that conclusion was not correct, it appears to us that the conclusion arrived at, so far as we are able to come to any determination on the point in the exercise of criminal jurisdiction, was correct. We are not aware that the question as to the effect of an ejectment order under s. 53 of the Rent Law has yet been considered on the civil side of the Court. But looking at the provisions of the Act itself it seems to us that the conclusion arrived at by the Deputy Magistrate, that the effect of an ejectment under the Rent Law is, to dispossess the ryot, not only of the land, but also of the crop standing thereon, was a reasonable one. The object of that ejectment is to completely terminate the connection between the parties as landlord and tenant. The ejectment is in itself by way of penalty for non-payment of the rent of previous years, and the provisions of s. 54 of the Rent Law are extremely stringent. That section does not allow the Court executing the decree to entertain any application for stay of execution, and it does not allow any person evicted under an ejectment order to be restored to possession at all, unless the decree shall be reversed.

We are, therefore, of opinion, that the conclusion at which the Deputy Magistrate arrived, as to the effect of the ejectment order, was a correct one; and that he would have been perfectly justified, in taking steps, under the provisions of the Criminal Procedure Code, for protecting the decree-holders from violence, when they proceeded to enforce their claim to the crop standing on the land from which the ryots had been ejected.

With reference to the explanation of the Deputy Magistrate, dated the 3rd of April 1879, in which he says that he is not aware that there is any particular section of the law applicable to his action, we would observe that if the law did not allow him to act in the way in which he did, his action clearly was illegal. He was bound to follow the provisions of the law, which properly applied are sufficient for providing against a breach of the peace. In support of his view, that, in the absence of any special law, he was justified in acting on his own discretion, Mr. Hampton says,—that "there is no section of the law authorizing return of stolen property recovered, to the man robbed, yet it is in reason that the property should be so returned." Mr. Hampton has apparently overlooked the provisions of s. 418 of the Code. That section clearly provides for the case which he supposes to be left not provided for.

CALCUTTA HIGH COURT.

FULL BENCH.

THE 1ST JUNE 1880.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice L. S. Jackson, C. I. E., Mr. Justice C. Pontifex, Mr. Justice G. G. Morris and Mr. Justice Romesh Chunder Mitter.

Appeal from Appellate Decree No. 2307 of 1879.*

GUJJU LAL (*Defendant*) *Appellant*,

versus

FATEH LAL (*Plaintiff*) *Respondent*.

For Appellant.—Mr. M. M. Ghose and Baboo Jogesh Chunder Dey.
For Respondent.—Baboo Mohesh Chunder Chowdhry.

Res inter alios acta—Judgment in a former suit—Evidence Act, ss. 3, 11, 13, 40, 41, 42 *and* 43.

It was decided in a suit, in which G was the plaintiff and J and others, the defendants, and to which F was no party, that S was the nearest heir of B. Subsequently F brought a suit against G, and it was admitted on both sides that F would succeed, if S was the nearest heir of B. *Held* (Mitter, J., *dissentiente*) that the judgment in the former suit was inadmissible in evidence in the subsequent suit.

THIS case was referred to a Full Bench by the Honorable Sir Richard Garth, Knight, Chief Justice, and the Honorable Romesh Chunder Mitter, one of the Judges of the Court, on the 11th March 1880, with the following opinion :—

"This special appeal depends upon a question of law, which we think should be referred to a Full Bench.

"It was admitted on both sides in the Lower Courts, that if Sham Behari Lal survived Musst. Sheo Buchan Koer, then the plaintiff was the nearest heir of Bhijhuk Lal, and, as such, was entitled to succeed; but if, on the other hand, the Musst. survived him, then he was not so entitled.

"In the Court of first instance, the plaintiff relied upon a judgment in a former suit, dated the 16th of June 1876, in which the question was raised between Gujju Lal, the present defendant (who

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* Appeal against the decree of the Judge of Gya dated the 23rd of August 1878, affirming the decree of the Subordinate Judge of that district, dated the 12th of July 1876.

was the plaintiff in that suit), and Jankee Singh and others (the defendants in that suit), whether Gujju Lal or Sham Behari Lal was the nearest heir of Bhijhuk Lal.

"It was decided in that suit, that Sham Behari Lal was the nearest heir of Bhijhuk Lal.

"In this suit, it was contended by the defendant in both the Lower Courts, that the judgment in the former suit could not be used as evidence in this suit, because the present plaintiff was no party to the former proceedings; while the plaintiff, on the other hand, contended that the former judgment was admissible in evidence under s. 13 of the Evidence Act, as being a transaction by which the right claimed in this suit by the plaintiff was asserted and denied.

"Both the Courts considered the judgment admissible in evidence, and upon the strength of it, decided in the plaintiff's favor.

"It has now been contended before us on special appeal, that the Lower Courts were wrong in admitting the former judgment as evidence in this case; and upon this one point the special appeal depends.

"It has been decided by this Court in several cases, three of which are reported in XXIII W. R., pp. 162, 296, and 311, that decrees in suits between third parties are admissible in evidence under s. 13 of the Evidence Act, whilst in other cases in this Court, such evidence has been constantly rejected.

"The question, therefore, referred to the Full Bench is—Whether under s. 13 or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in this suit, was legally admissible?"

Garth, C. J.—I am of opinion that the former judgment was not admissible as evidence in this suit.

It was contended, in the first place, that it was admissible under s. 13 of the Evidence Act, as being a 'transaction' in which the right in question in the present suit was claimed and recognised.

I consider that the former judgment was not a "transaction," and that the right claimed in this suit is not a "right" within the meaning of s. 13.

A transaction, in the ordinary sense of the word, is some business or dealing, which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction, and, by a

somewhat strained use of the word, the proceedings in a suit might also be called "transactions," but to say that the decision of a Court of Justice is a transaction, appears to me to be a misapplication of the term.

Then, again, as to meaning of the word "right" in this section.

It is argued by the respondent's Counsel that it means *any right* which can possibly be made the subject of a suit, but if this were its true meaning, the provisions of the section would necessarily apply to all suits, because the plaintiff in every suit claims a right of some kind, the existence of which forms the ground of his claim. Surely this view is inconsistent with the first sentence of the section, because that sentence seems very plainly intended to confine its operation to a particular class of suits, *viz.*, those in which "a question as to the existence of some right or custom" is raised.

It may be difficult, perhaps, to define precisely the scope of the word "right," but I think it was here intended to include those properties only of an incorporeal nature, which, in legal phraseology, are generally called "rights," more especially as it is in conjunction with the word "custom."

It is certainly used in that sense in subsequent parts of the Act. (*See* s. 48 and sub-s. 4 of s. 32), which deal with matters of public or general "right or custom," and in s. 13, the word is probably intended to include both public or private rights of that nature.

The "right of fishery" mentioned in the illustration, is a right which may be either public or private, according to circumstances.

That the expression is used in this limited sense, is shown also, as it seems to me, by the words, with which it is associated. The right mentioned in the section is one which can be "created" or "exercised, which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word "right" when used in its more extended sense. It would be quite correct to speak of the *creation* or the *exercise* of a right of way, or of a franchise, but no lawyer would think of saying that a right to a chattel or to damages had been either "created" or "exercised."

I consider, therefore, in the first place that the judgment in the former suit is not a "transaction" within the meaning of s. 13, and in the next place, that if it were, it does not relate to the sort of right which is intended by the section.

But then it is argued, that if the former judgment was not admissible under s. 13, it was so under s. 11, as being a "fact," which either by itself or taken in connection with other facts, makes the case set up by the defendant improbable.

No doubt the former judgment decided, that the present defendant was entitled to the right, which he claims in this suit; but the question is, whether that decision can be properly considered *as a fact*. If it can, then all judgments or decisions of a Court of Justice, whatever may be their nature, and whoever may be the parties to them, would be equally admissible under s. 11, so long as they contained an adjudication, which is adverse to the claim of either party in a subsequent civil suit.

Thus a decision by a 3rd Class Magistrate in a Criminal proceeding with reference to the possession of land or other property, would be admissible as evidence in a civil suit between third parties who were not represented in that proceeding, provided only that the decision of the Magistrate was adverse to the claim of either party to the suit. As for instance, if the Magistrate decided that C. was in possession of certain property, his decision would be admissible in a subsequent civil suit between A. and B., where both claimed the same property, in order to show the improbability, that at the time of the Magistrate's decision, the property belonged either to A. or B.

It is said that, in this particular case, the defendant, against whom the former judgment is sought to be used, was the plaintiff in the former suit, and had, therefore, ample opportunity in that suit, of contradicting the evidence that was brought against him. But s. 11 makes one exception in favor of that or any other class of cases. If a previous adverse judgment is admissible in a civil suit under that section, it matters not what may have been the nature of the previous proceeding, nor who may have been the parties to it.

I consider that an adjudication or opinion expressed in a judgment is not properly speaking "a fact" and certainly not a fact within the meaning of s. 11. The delivery or existence of the judgment itself may be a fact; but the decision, which the judgment contains, is no more a fact, than an opinion expressed by any other person who is not exercising judicial functions. Thus, if an opinion were given by the Legal Member of Council in answer to a question by the Government, or by a person skilled in any Art or Science, with regard to some matter specially within his own province, that opinion,

as it seems to me, would be quite as much a fact, and as admissible in evidence under s. 11, as the decision of a Judge upon a question, which it was his duty to determine.

But apart from these considerations, which arise out of the particular language of ss. 11 and 13, I think that, upon far higher and more substantial grounds, it is plain, that the Legislature could never have intended to allow that wholesale departure from the English law upon this subject, which the respondent's contention would involve; and that they certainly never intended to effect that departure by means of ss. 11 and 13, which, professedly, do not relate to judgments at all.

I suppose that it must be generally acknowledged that, with some few exceptions, the Indian Evidence Act was intended to, and did, in fact, consolidate the English law of evidence.

The different chapters of the Act deal *seriatim* with the relevancy and consequent admissibility of the different kinds of evidence, and upon this principle, ss. 5 to 16 deal with the admissibility of *facts*, whilst ss. 40 to 45 deal expressly with *judgments*, and I cannot help thinking, with all deference to the opinions of those learned Judges who have expressed a contrary opinion, that if it had been really the intention of the Legislature to depart entirely from the English rule, and to make a very large class of judgments admissible here, which had never been admissible, before the Act, either in England or this country, they would have expressed their intention more plainly by means of suitable provisions introduced into that portion of the Act, which deals exclusively with judgments.

If there is one rule of law, which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is this, that, except in the case of judgments *in rem* and judgments relating to matters of a public nature, which are governed by a different principle, no man ought to be bound by the decision of a Court of Justice, unless he or those under whom he claims were parties to the proceeding, in which it was given.

But if the construction, which the respondent would put upon s. 13, is the correct one, any judgment of a competent Court, founded upon any conceivable right, would be evidence in any subsequent suit relating to the existence of the same right, although the parties to the two suits might be altogether different, and it is argued, moreover, that this radical change in the Law of Evidence, has been

brought about, not by any direct enactment upon the subject of judgments, but by treating judgments as "transactions" under s. 13, and giving to the words "transaction," and "right" in that section, what appears to me to be, an incorrect interpretation.

And with all due respect to the learned Judges who have adopted this view, I would add that the mistake (as I consider it) into which they have fallen has arisen in great measure from an erroneous supposition, that under ss. 40-43 the English law upon the subject of judgments, has been imperfectly enacted, and in order to give it its full scope, it is necessary to have recourse to ss. 11 and 13.

Thus it has been considered that s. 40 only makes former decrees admissible, when they have the effect of preventing a Court of Justice *from taking cognisance of a suit*, that is, *from dealing with a suit in its entirety*, and that the words "holding a trial" must necessarily refer to Criminal proceedings only.

This construction of s. 40, would, of course, confine its operation very materially. For example, in the case of a suit for 3 years' rent, if a former decree had decided against the claim as regards the first year's rent only, that decree would by law be a bar to the suit as regards that one year's rent. But in the view which has been taken of the section, the decree though a bar to the second suit *pro tanto*, would not be admissible in evidence under that section, because it would not prevent the Court from taking cognisance *of the whole suit* but only *of a part of it*.

So, again, if in answer to a suit some ground of defence were set up, which had been decided against the defendant in a former judgment between the same parties, that judgment, though undoubtedly a legal bar to the defence set up, would not be admissible under s. 40, because it would not prevent the Court from taking cognisance *of the suit*, but only of *a defence set up to it*.

But surely it could never have been the intention of the Legislature to confine the effect of s. 40 in this way, to let in, as relevant evidence under that section, one portion of a class of judgments, which operate by law as estoppels, and to leave another portion of the same class of judgments which operate equally as estoppels, to be admissible as "transactions" under some other section of the Act.

It is true that s. 40 might have been more clearly worded. It has in fact much the same defect as s. 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of *Suryamani Dayee*

vs. *Sudananda Mohapatra* (XII, B. L. R., P. C., 305). But I cannot doubt that it was intended to include all judgments, which by law operate to prevent a Court, whether Civil or Criminal, from taking cognisance of a suit or trying any particular issue. The words "holding a trial" are amply large enough to admit of this construction, and it is not because in some other Act the words "holding a trial" may have been construed to refer to Criminal trials only, that we ought to confine their meaning in the same way in s. 40 of the Evidence Act.

If this view is right, it disposes, as it seems to me, of the only real difficulty suggested by the respondent, and it will be found that many of the judgments, which in the cases cited to us in argument, have been held by learned Judges to be admissible under s. 13 only, were really admissible under s. 40.

Thus in the case put by my learned brother, Mr. Justice Mitter, in his judgment, of the Mocurruree Pottah, the former judgment would undoubtedly be admissible under s. 40 and would have the effect of prohibiting the Court from trying the same issue a second time.

So, in the case cited from the 3 I. L. Reports, Bombay Series, p. 3, decided by Sir Michael Westropp and Mr. Justice Melvill, I entirely agree in the conclusion arrived at by those learned Judges, because I consider that the former decrees were clearly admissible under s. 40, and were conclusive between the parties *as to the existence of the plaintiff's right at the time when those decrees were passed.*

S. 40, in my opinion, admits as evidence all judgments *inter partes*, which would operate as *res judicata* in a second suit. S. 41 admits judgments *in rem* as evidence in all subsequent suits, where the existence of the right is in issue, whether between the same parties or not. And s. 43 admits all judgments, not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the inquiry.

Putting this construction upon these 3 sections., it will be found, that they do really embody the English law as to the admissibility of judgments, as it existed at the time when the Indian Act was passed; and it would be strange, indeed, if having taken the pains to confine, by these sections, the admissibility of judgments to these cases, where they would be admissible by English law, the framers of the Act had,

by another and a previous section, disregarded the English law entirely and had admitted as evidence *all judgments*, whether *between the same parties or not*, which related to the same subject-matter.

It is obvious that if the construction, which the respondent's Counsel would put upon s. 13, is right, there would be no necessity for ss. 40, 41 and 42 at all.

Those sections would then only tend to mislead, because the judgments which are made admissible under them, would all be equally admissible as "transactions" under s. 13, and not only these but an infinite variety of other judgments which had never before been admissible either in this country or in England.

And it is difficult to conceive why under s. 42, judgments, though not between the same parties, should be declared admissible "so long as they related to matters of public nature," if these very same judgments had already been made admissible under s. 13, *whether they related to matters of public nature or not.*

But then it is said that s. 43 expressly contemplates cases, in which judgments would be admissible under other sections of the Act, which are not admissible under ss. 40, 41, or 42. This is quite true. But then I take it that the cases so contemplated by s. 43, are those where a judgment is used, not as a *res judicata*, or as evidence more or less binding upon an opponent by reason of the adjudication which it contains,—because judgments of that kind had already been dealt with under one or other of the immediately preceding sections,—but the cases referred to in s. 43, are such, I conceive, as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case.

As, for instance, if A. sued B. for slander, in saying that he had been convicted of forgery, and B. justified upon the ground that the alleged slander was true, the conviction of A. for forgery would be a fact to be proved by B. like any other fact in the case and quite irrespective of whether A. had been actually guilty of the forgery or not.

This I conceive would be one of the many cases alluded to in s. 43.

Then, again, it was argued that, in this country the rules of evidence in the Mofussil, especially as to the admissibility of former decrees, were never so strict as in England, and in support of that

contention, several cases were cited to us, decided by Mr. Dwarka Nath Mitter and other eminent Judges of this Court, and we are referred to certain observations made by their Lordships of the Privy Council to the same effect. (*See* 7 M. I. App., 128.)

But these cases, it must be borne in mind, occurred many years ago, at the time when the practice in the Mofussil in this respect, was very lax and before the Evidence Act was passed, and the observations of the Privy Council were made, as I humbly conceive, not as approving of this laxisty of practice, but rather as excusing it upon the ground that the Mofussil Courts were not at that time sufficiently acquainted with our English Rules of Evidence as to be able to observe them with any thing like accuracy.

I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed; and if that Act can now be made the means, as I trust it will, of preventing the mischief, which too frequently occurs, of decrees between third parties being improperly admitted as evidence in Mofussil Courts, it will prove a very valuable aid to the administration of justice. I consider that the reception of loose evidence of that kind is especially dangerous in a country like this, where unhappily decrees are so often collusively obtained for no other purpose, than to make them evidence in future suits between third parties.

It was argued that instead of binding the Courts of this country by the strict rules of evidence, it would be more desirable, and it was in fact the intention of the Evidence Act, to render all decrees admissible in evidence as "facts" or "transactions," leaving it to the discretion of the Courts to attribute to each judgment its due weight. But to my thinking this liberty of action would be extremely unsafe, and certainly I am not surprised to find that the Legislature here were unwilling to leave to the Subordinate Courts in this country a discretion which it has not been thought safe or right to entrust to English Judges.

I am, therefore, of opinion that the former judgment was not admissible in the present suit, and as the majority of this Court are of that opinion, the case must go back to the Court below to be decided upon the other evidence.

The appellant will be entitled to his costs in this Court, and those of the Court below will follow the result of the suit.

Morris, J.—I agree with the Chief Justice in holding that the former judgment was not admissible as evidence in the present suit.

Pontifex and Jackson, J. J.—Passed separate judgments concurring with the Chief Justice.

Mitter, J.—Passed a *dissentienté* judgment.

CALCUTTA HIGH COURT.

FULL BENCH.

THE 1ST JUNE 1880.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice L. S. Jackson, C. I. E., Mr. Justice C. Pontifex, Mr. Justice G. G. Morris and Mr. Justice Romesh Chunder Mitter.

ISHWUR CHUNDER DUTT and others, *Plaintiffs, Appellants,*
versus
RAM KRISHNA DASS, *Defendant, Respondent.*

Sale of a share in tenure—Severance of tenure—Apportionment of rent how effected.

Where a tenant holds a tenure in its entirety, the sale of a share in the tenure, whether made privately or by public auction, does not of itself necessarily effect a severance of the tenure or an apportionment of rent. If the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit.

THIS case was referred to a Full Bench by the Honorable Sir Richard Garth, Knight, Chief Justice, and the Honorable Romesh Chunder Mitter, one of Judges of the Court, on the 12th February 1880, with the following opinion :—

"This is an appeal against the decision of a learned Judge of this Court, which followed the ruling of a Division Bench in Special Appeal No. 1617 of 1878, involving the same point; and as we entertain serious doubt as to the correctness of that ruling, and as there are apparently inconsistent decisions of this Court upon the point, we think it right to refer the question to a Full Bench.

"The admitted facts appear to be these ;

"The defendant is the tenant of a certain tenure, which originally belonged to Ram Gopal Nundy and Heera Kristo Nundy in equal shares.

"Ram Gopal Nundy's eight annas share then came by inheritance to one Komola Kant, and Komola Kant sold a four-anna share out of the eight annas to the plaintiff's uncle, from whom the plaintiff acquired it as his uncle's heir.

"The defendant has paid rent to Komola Kant for his 4 annas share, but has never paid any rent to the plaintiff in respect of the 4 annas; and he denies the plaintiff's right to sue for such rent, insisting that he has hitherto paid rent for 4 annas of the entire tenure to Komola Kant, and for the remaining 12 annas to Ridoy and others, who claim under Heera Kristo Nundy.

"In this state of facts, it has been decided as a matter of law by a Division Bench of this Court that although Komola Kant was entitled to an eight-anna share of the tenure, and conveyed 4 annas of that share to the plaintiff's uncle, and although the plaintiff is undoubtly entitled to that 4 annas as his uncle's heir, he has no right to sue the defendant for the rent of it, until some engagement has been entered into between him and the defendant, creating the relation of landlord and tenant; and rendering the defendant liable to pay the rent of the 4 annas share to the plaintiff.

"It was decided in the Full Bench case of Gurri Mahomed *vs.* Miran (I. L. R. 4 Cal., 96), that one shareholder of an entire tenure cannot bring a suit to enhance the rent of his separate share, or for a kabuleat, merely upon the ground that by arrangement with the other shareholders, his rent has been paid separately.

"But here the plaintiff derives title to a 4 annas share of the tenure by a legal conveyance, and the questions which we desire to refer to a Full Bench are—

"*1st.*—Whether under such circumstances, the tenure is not severed in the same way as it would be under a parition made by the Collector, and

"*2ndly.*—Whether the plaintiff, assuming the rent claimed not to have been paid by the defendant to any of the other shareholders, is entitled to recover in this suit the proportionate rent of the share conveyed, although there has been no engagement or consent by the defendant to treat the plaintiffs as his landlords.

"(See *Indromonee Burmonee* v. *Surup Chunder Pal*, 15 W. R., 395; *Surut Sundri* v. *Anund Mohun Ghuttuck*, 4 Calcutta Reports, 450; *Bany Madhub Ghose* v. *Thakoor Doss Mundul*, 6 W. R. Act X Rulings, p. 74, *per* Peacock, C. J.")

Decision of Full Bench.

It appears to us that having regard to the weight of authority in this Court, as well as to the question of principle and convenience, the proper solution of the points referred to us is as follows:

That a sale of share in a tenure, which has been let to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure, or an apportionment of the rent; but that if the purchaser of the share desires to have such a severance or apportionment, he is entitled to enforce it, by taking proper steps for that purpose.

If he takes no such steps, then the tenant is justified in paying the entire rent, as before, to all the parties jointly entitled to it. But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit.

No real injustice will be done to the tenant under such circumstances, because the possibility of the severance of the tenure by butwara, sale, or otherwise, is only one of those necessary incidents of property which every tenant is, or must be presumed to have been, aware of when he took his lease, and as regards the costs of any suit which may be brought for the purpose of having the rent apportioned, they would of course be a matter for the discretion of the Court, and would probably depend upon how far in each case the tenant has had a fair opportunity of amicably adjusting the apportionment.

An instance of a suit of this nature will be found in the case of *Sreenath Chunder Chowdhry* v. *Mohesh Chunder Banerjee* (1 Calcutta Law Reports, p. 453) decided by Jackson and Cunningham, J. J., where seven Mouzahs had been let in putni to certain tenants by the Zemindar, and then under a decree against the Zemindar, three of

those Mouzahs were sold to A, and the other four to B. A. then brought a suit against the putnidars to have his share of the putni rent apportioned, making B., the purchaser of the other Mouzahs, a party to the suit, and it was held, that the suit was properly brought.

It appears to us that this case was rightly decided; and that it is impossible upon principle to distinguish cases, where a tenure was sold *privately* from those where it is sold by *public auction*, or, on the other hand, to distinguish cases where a tenure is severed by different portions of its area being sold to different persons, from those where it is sold to different persons in undivided shares.

In all cases of this kind, the entirety of the joint interest should be considered as severable at the option of the purchaser; and it would lead to most inconvenient results, and to the depreciation of property thus sold in different lots, if the purchasers of such lots were compelled to collect their rents in one entire sum, conjointly with one another, or with the owners of the unsold shares or portions.

In this particular case as the plaintiff did not take any proper steps to make arrangement with the tenant or to obtain an apportionment of the rent, the learned Judge of this Court was right in dismissing the suit, and this appeal must consequently be dismissed with costs, including those of the hearing before the Full Bench.

HIGH COURT, N. W. P.

FULL BENCH.

THE 18TH JUNE 1880.

Before Sir Robert Stuart, Knight, Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield and Mr. Justice Straight.

NATH PRASADA, *Plaintiff, Appellant,*
versus
BAIJ NATH LALL, *Defendant, Respondent.*

S. 70, Contract Act—Suit for contribution—Jurisdiction.

In the present case, the plaintiff paid the revenue for the defendant lawfully, that is, for a lawful purpose; he did not intend to do so gratuitously, and the defendant adopted and enjoyed the benefit of the payments. The position of the parties, therefore, directly falls within the terms of s. 70 of the Contract Act. The suit for recovery of the money paid was in reality one for damages and therefore cognizable by the Small Cause Court.

One Mussamut Kaula Koer had a 5 annas 4 pie share in the village of Madanpur. Upon her death disputes arose among her heirs, of whom the defendant, respondent, is one, and thereupon the plaintiff, who was not a shareholder in the village, was on the 28th January 1874, entered in the Revenue Records as Lumberdar of the share of the deceased Mussamut, and so continued until the 28th February 1878, when the name of the respondent as heir, was substituted. Between 1874 and 1878 the appellant had paid various sums for revenue due in respect of the 5-anna 4-pie share of the village of Madanpur, and it was to recover these amounts from the respondent that the present suit was brought on the 5th February 1879.

Straight, J. (in delivering judgment said):—

But now comes the real and important question. Was it of a nature cognizable by a Court of Small Causes, or in other words, does it fall within the terms of s. 6 of Act XI of 1865? No doubt there are many cases to be found in our Reports in which it has been held that a suit for contribution cannot be brought in the Court of Small Causes, and notably a judgment by Sir Barnes Peacock in 1867 may be found in 7, *Weekly Reporter*, page 377, though it is right to add that there is also one of the Madras High Court in 1870 (M.H.C Rep., Vol. V, page 200) which is directly adverse. I think, however, that neither of these important decisions should have any bearing or influence one way or other on the determination of the question before this Court. They were both of them delivered before the passing of Act XI of 1872, when legislation had not stepped in with plain language, to give distinct vitality and effect to certain relations between parties out of whose moral obligations, one to another, a legal fiction had grown up of implying a contract; and while, as learned expositions of law, they may be read with interest and advantage, for practical purposes, to the point under consideration, they are absolutely irrelevant. Chapter X of the Contract Act provides for "certain relations resembling those created by contract," and ss. 60 and 70 seem specially framed to meet cases in which, while no contract can be said actually to exist (and to imply one, involves a resort to legal fiction) justice and equity require a person for whom an act has been done by another, or money has been paid by another, of which he enjoys the benefit,—such other not intending to do the act or make the payment gratuitously, to

reimburse or compensate the person doing such act, or making such payment. Consequently these two sections create a statutable duty, or in other words, turn a natural into a legal obligation in the person for whom the act has been done or the payment has been made towards the person doing such act and making such payment; and the latter may call upon the former to fulfil such duty and obligation, and if he fail to discharge it, he will be responsible in damages for the breach. In the present case, the plaintiff paid the revenue for the defendant lawfully, that is, for a lawful purpose: he did not intend to do so gratuitously, and the defendant has adopted and enjoyed the benefit of the payments. The position of the parties, therefore, directly falls within the terms of s. 70 of the Contract Act. The plaintiff's suit in reality was one for damages, the measure of which will be the amount he has actually paid, and as such, was of the nature cognizable by a Small Cause Court. The amount so sought to be recovered being under Rs. 500, s. 586 of the Civil Procedure Code consequently applies, and no second appeal can be had from the decision of the Officiating Judge to this Court.

Pearson, J.—I concur.

Oldfield, J.—I agree in the opinion expressed by Mr. Justice Straight.

Pearson and Oldfield, J. J.—Concurred.

Stuart, C. J., in delivering a separate judgment substantially concurred in the above opinion.

CALCUTTA HIGH COURT.

FULL BENCH.

THE 8TH JUNE 1880.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice L. S. Jackson, C. I. E., Mr. Justice C. Pontifex, Mr. Justice G. G. Morris and Mr. Justice R. Mitter.

CHUNDER SIKHAR BUNDOPADHYA, Chairman of the Santipore Municipality, (*Defendant*) *Appellant,*

versus

OBHOY CHURN BAGCHI and others, (*Plaintiffs*) *Respondents.*

Suit for land—Limitation—S. 87, Act III (B. C.) of 1864.

S. 87 of Act III (B. C.) of 1864 applies only to cases where the plaintiff claims damages or compensation for some wrongful act commited by the Commissioners or their officers. It does not apply where the suit is for the specific recovery of land, irrespective of such damages.

THREE cases were referred to a Full Bench by the Hon'ble Louis Stuart Jackson and the Hon'ble Loftus Richard Tottenham, two of the Judges of the Court, on the 22nd April 1880, with the following opinion :—

No. 348.—The question arises in this case whether the suit, which is not brought for the purpose of recovering damages on account of a wrong done, but to recover possession of a specified quantity of land, taken by the Municipal Commissioners of Santipore, is barred under s. 87, Act III of 1869 (B. C.) now repealed, by reason of the suit not having been commenced within 3 months next after the accrual of the cause of action. In a case very similar in IX W. R. 535, before Bayley and Phear, J.J., the former learned Judge was of opinion that the special rule of limitation applied, Phear J. questioned this, but concurred in dismissing the suit on other grounds.

In 5 B. L. R., there is a case before Loch and Hobhouse, J.J, where s. 87 was held not to apply, on grounds which appear open to observation, and in I. L. Report 1, Allahabad 269, the High Court of the N. W. P. adopted the view of Phear, J.

There is a case, however, in 7 W. R., 92, where Norman, J., rather broadly laid it down that 3 months' notice was necessary when the plaintiff sued to restrain the Commissioners from interfering with a road which he claimed as his private road.

There is thus some conflict of decision, and although the inclination of our own opinion is decidedly in favor of the view taken by Phear, J., still as the point is of considerable importance, we think it right to refer the matter to a Full Bench.

Decision of the Full Bench.

As the relief, which has been decreed in these suits, is for the specific recovery of land, irrespective of any damage for the plaintiff's dispossession, we consider the 87th s. of Act III (B. C.) of 1864 does not apply.

That section, as it seems to us, is applicable only in those cases, where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise or honestly supposed exercise of their statutory powers.

The notice in the earlier part of the section is meant to give the defendant the opportunity of making some pecuniary amends for the wrong, without incurring the cost of litigation.

We think that it could hardly have been the intention or the Legislature to allow the Commissioners (even by mistake) to appropriate the lands of private persons without paying for them and to hold these lands for ever as against the true owners, unless the latter should happen to be sufficiently watchful to discover the aggression in time to take steps to protect their property within so short a period as two months.

The appeals will be dismissed with costs, including the costs of this reference.

CALCUTTA HIGH COURT.

THE 24TH JUNE 1880.

Before Mr. Justice Morris and Mr. Justice Prinsep.

HUSSEN BUKSH SHEIKH and others

versus

THE EMPRESS.

Trial of parties to a riot, how to be conducted—Ss. 250, 264 *and* 265 *of the Code of Criminal Procedure.*

In cases of riot, each party should be tried separately.

Where criminal proceedings are substantially bad in themselves, the defect cannot be cured by any waiver or consent of the accused or of his pleader.

According to s. 264 of the Code of Criminal Procedure, the Court can only adjourn the trial if it considers that such adjournment is proper and will promote the ends of justice.

S. 265 does not contemplate that two trials shall be conducted piecemeal, and that at their conclusion, the Jury shall be called upon to decide at one and the same time upon two distinct classes of evidence. It only means that on the conclusion of one trial the same Jury may proceed to try the accused in the next case.

The real object of s. 250 of the Code of Criminal Procedure is to enable a Judge to ascertain, from time to time, from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or, after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. The section does not give the Sessions Court power to convert itself into a Court of Inquisition and to force a prisoner to convict himself by making some criminating admissions after a series of searching questions put to him by way of cross-examination.

Mr. Justice Prinsep :—

In an attempt made by certain villagers of Juggernathpore to remove an obstruction to the flow of water erected by the villagers of Secunderpore, a riot took place in which Shariutoola, one of the Juggernathpore people, was killed.

In accordance with the procedure which has been prescribed in such cases by numerous rulings of this Court, the Magistrate held separate proceedings against each party, keeping the evidence against them separate, and he committed the contending villagers for trial by the Court of Sessions in separate cases.

The case against the Secunderpore villagers first came on for trial. After the close of the evidence for the prosecution (so the Sessions Judge records) "by arrangement with the pleaders the case for the defence in the present trial was postponed till after the conclusion of the case for the prosecution in the counter trial," that is, the case against the Juggernathpore villagers. The trial of the case last mentioned then commenced.

"The Judge required the same jury as were then sitting on the counter case," *i.e*, the case against the Secunderpore villagers to "sit on the present trial. The pleaders for the prosecution and for the defence in both cases had suggested this course." After the close of the evidence for the prosecution in this case, the Sessions Judge returned to the first case and took the evidence for the defence. He then took the evidence for the defence in the second case; the pleaders for the defence addressed the Court in both cases. The Government pleader for the prosecution in both cases replied. The Sessions Judge delivered a written summing up in both cases simultaneously, and then received and recorded the verdict of the jury, convicting all the prisoners in both cases. The prisoners were accordingly sentenced, and they have now appealed to this Court.

The objection taken in both appeals is the same, that the prisoners have been prejudiced by the manner in which the two cases have been virtually tried together. Before dealing with this objection, we feel bound to say that the mode of trial adopted by the Sessions Judge is quite opposed to that which for many years past has been pursued in cases where the members of opposing factions are charged with rioting. The very salutary rule which requires that, in such cases, each party should be tried separately, has here been practically violated by the procedure adopted by the Sessions Judge.

It is true that the Sessions Judge has so far complied with this rule as to take evidence and record the defence of the accused person in each case, but looking at the procedure which has been already described, we cannot, in any sense of the term, regard these as two separate trials. They are certainly not distinct from one another, because the two trials were not only held before the same jury, but they proceeded almost in parallel lines until they united in the addresses of the pleaders engaged, and in the Sessions Judge's summing up. There is no authority in law for such a procedure. But it is suggested that the prisoners cannot plead that they have been prejudiced, because this mode of trial was adopted at the suggestion and with the consent of the pleaders engaged. We cannot, however, accept this suggestion, for, as pointed out by Macpherson, J., in the case of Queen *vs.* Bholanath Sen, Weekly Reporter, p. 57, when criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused or (we would add in the present case) of pleader for the accused. The "arrangement," as the Sessions Judge terms it, seems to have been adopted for the convenience of the pleaders themselves and from a narrow, but, we think, a mistaken view, on their part, that it would benefit their clients. As for the prisoners themselves, we cannot suppose that they had any voice or understanding in the matter.

We will now proceed to consider the effect of the procedure adopted in the several stages of each case as regards the position of the several prisoners.

The law (s. 265, Code of Criminal Procedure) declares that the "same Jury may try as many accused persons successively as to the Court seems fit."

By this we understand that one trial is to follow the other; that is, that on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner, and that at their conclusion, the Jury shall be called upon to decide at one and the same time upon two distinct classes of evidence, which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceedings, no jury ought, we think, to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried and the

evidence bearing upon those issues should be laid before the jury, and that the mind of the jury should not be encumbered by the consideration of foreign and irrelevant matter.

These considerations do not appear to have been present to the minds of the pleaders of the different accused when they consented to the arrangement to which the Judge refers. But, as already pointed out, this consent on their part cannot prevent the prisoners from showing on appeal that they have been materially prejudiced by the course adopted. It is apparent that the prisoners accused in the second case had not the full benefit of s. 243, that is, of challenging the jurors who were to try them. Who can doubt that if the first case, which was that of the Secunderpore accused, had been tried out and resulted in an acquittal, the Juggernathpore accused would have at once challenged all the jurors on the ground that they were not likely to address themselves to the case, as it affected them, with impartial and unbiased mind? So also the Secunderpore people might justly complain that, though they had the right of challenge before their own trial commenced, they could have no right to object to the trial by the same jury of the second case, notwithstanding that they might be seriously prejudiced by evidence given in that case criminating them behind their backs, and without their having an opportunity of cross-examination.

It has been argued that the Sessions Judge has power under the law to adjourn a trial, and that consequently it was not illegal on his part to commence the second trial before the conclusion of the first. But, according to s. 264, the Court can only adjourn the trial if it considers that such adjournment is proper and will promote the ends of justice. No reason for the adjournment, in turn, of each trial, has been stated. From the terms of the Sessions Judge's summing up, it would seem that the "arrangement" was suggested by himself or by the Government Prosecutor, for he states that "it was acquiesced in by the pleaders for the defence in both cases." In our opinion the adjournments were neither "proper," nor likely to "promote the ends of justice." But even admitting that under some circumstances a second case may be tried by the same jury during the pendency of the first trial, it by no means follows (and this constitutes a very grave objection) that the two cases should be summed up together and decided simultaneously.

The Sessions Judge, in the commencement of his summing up, has himself indicated this objection to the procedure adopted by him. He tells the jury that the evidence for the prosecution in one case is "practically that for the defence in the other, though a special defence has been made in each case." The Judge, no doubt, felt the difficulty in which the jury were placed, for he states, "I proceed to sum up the evidence in both cases on this single charge, in which, however, I will do my best to keep each case, and the evidence proper to it, single before you."

We recognise the Sessions Judge's endeavours to do his duty in this respect, but he seems to have lost sight of the fact that some of the prisoners in each case were examined as witnesses in the other, and that, under such circumstances, it was impossible to expect that the jury should be able to separate in their minds what was said by a prisoner as a witness from what he admitted on examination as an accused. A witness under s. 132 of the Evidence Act cannot excuse himself from answering any relevant question upon the ground that the answer to such question will criminate or may tend directly to criminate him, but the law also provides that no such answer which a witness shall be compelled to give, shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. It is unnecessary to refer to the particular statements made by seven of the prisoners, three on one side and four on the other, when under examination as witnesses, but several criminating statements have been made by them, especially in cross-examination. The Sessions Judge has made no attempt to exclude these statements, and we think that, considering the evidence of both these cases together, the jury could not separate the evidence in each, and, even in spite of the strongest precautions both on their own part and on that of the Judge, must unconsciously have been influenced in the one case by evidence given in the other. There was no such interval between the two trials as would enable them to efface from their minds the effect of the evidence in one case when considering their verdict in the other. So far, therefore, as the prisoners who were also examined as witnesses in the two cases are concerned, we are quite clear that this irregularity has prejudiced them most materially in their defence. It is almost impossible to distinguish between the case of these accused and that of their fellows, though, from the position that the former occupied as witnesses, we have less hesitation

in finding that they have been very seriously prejudiced by the mode of trial adopted by the Sessions Judge.

Our attention has been directed to some cases, and particularly to a judgment of a Full Bench, reported at 8 Weekly Reporter, p. 47, in which it was held that the simultaneous trial of two parties engaged in a riot did not prejudice them so as to necessitate a reversal of their conviction and a retrial; but we observe that, in all these cases, the trials were held with the aid of assessors and not by jury as in the present case. This difference in the trial is most material as regards the particular effect on the prisoners. The Sessions Judge, with whom the decision in the one form of trial rests, is less likely than a jury to have been influenced by what he learnt in the other case, and, while the verdict of the jury would be final on the facts, the findings of the Sessions Judge would be open to correction by the High Court on appeal.

On these grounds, we consider that the prisoners in these cases should be retried before a separate jury in each case, and we accordingly set aside the convictions and sentences, and direct that the Sessions Judge do so proceed.

We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner after the manner of cross-examination of an adverse witness by Counsel.

This Court has already pointed out to the Sessions Judge on more than one occasion (see particularly the case of Chinecbash Ghose, reported in 1 Calcutta Law Reports, p. 436), that by exercising the power allowed by s. 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or, after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we observe that the Judge was engaged during the whole of the first day in examining the accused. In like manner, in the

second case, he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law.

We cannot consider that trials so commenced have been fairly conducted. The minds of both the Judge and jury are, at the outset, prejudiced by irresponsible statements made by the accused while subject to this system of cross-examination before their guilt had been established by the examination of a single witness.

We trust that the Sessions Judge will discontinue this practice which has been repeatedly condemned by this Court, and is, in our opinion, quite opposed to the spirit of our law in India.

CALCUTTA HIGH COURT.

THE 6TH FEBRUARY and 18TH MARCH 1879.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

FUZLUDEEN KHAN* *(Plaintiff)*

versus

FAKIR MAHOMED KHAN *(Defendant).*

Registration Acts (VIII of 1871), ss. 48, 50; and (III of 1877), ss. 48, 50.

—Innocent Purchaser—Possession—Notice.

Per GARTH, C. J.—The only reasonable construction of s. 50 of Act VIII of 1871 is, that where property under the value of Rs. 100 is purchased by two innocent purchasers, the one by a registered and the other by an unregistered deed, and there is no fraud shown, or other circumstances which in equity would protect the unregistered purchaser against the registered, the title of the latter shall prevail.

The section contains no such qualification, as that a purchaser under an unregistered deed, who has obtained possession, would have priority as against a subsequent purchaser under a registered deed, and the Courts are not at liberty to import such a qualification into the section.

Per PONTIFEX, J.—S. 50 is intended to apply to the case of two innocent purchasers, giving the preference to the one who has taken the greater precaution to secure his title, but is not intended to apply to the case of a subsequent purchaser who registers, but who, at the date of his purchase, had *actual notice* of a prior unregistered purchase.

THIS is an appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Tottenham, dated the 16th September 1878.

* *Vide* I. L. R., 5 Calc. 336.

The facts of the case will sufficiently appear from the following judgment:—

Garth, C. J.—In this case we are unable to agree with the learned Judge of this Court. The suit was brought by the plaintiff to recover the rent of a jote from the ryot-defendant, upon the ground, that he had purchased the estate of the defendant's landlord. The plaintiff's purchase, as to which there was no dispute, was effected by a deed of sale dated in Cheit 1282 (March 1876), which was duly registered. It is found as a fact by the Lower Court, that for some time previous to the execution of this deed, the defendant had been the tenant of the property under a kabuliat, which he had given to the father of the plaintiff's vendor, and had since paid rent to the latter in accordance with the kabuliat. The defendant's case was, that, by another deed of sale, dated in Pous 1282 (December 1875), two months prior to the plaintiff's deed, the landlord had conveyed the same estate to him, the defendant; but this bill of sale was not registered.

Upon these facts the District Judge held, that the plaintiff's registered deed must prevail against the defendant's deed which was not registered, and he made a decree in the plaintiff's favor for the rent claimed.

The learned Judge of this Court considered, that the District Judge was wrong. He says, that s. 50 of Act VII of 1871 ought not to be construed literally, and that, if the defendant's bill of sale in this case was really executed before the plaintiff's bill of sale, the vendor's right to make a conveyance of the same property to the plaintiff or to any one else, was at an end, and that in that case nothing passed to the plaintiff by his deed, whether it was registered or not.

The learned Judge, therefore, remanded the case to the District Judge to determine the question, whether the defendant's deed was genuine, with an intimation that if it was so, the defendant ought to succeed.

I cannot agree with the learned Judge in the construction which he has thus put upon s. 50 of Act VIII of 1871, and it appears to me that if that were the right construction, the section would be virtually inoperative.

It is perfectly true, that s. 18 of the Act leaves it optional with purchasers, when the value of the property purchased is under

Rs. 100, to register their deeds or not; but if they elect not to register, I think that the Act intends, that they shall be subject to the risk (under s. 50) of having their title displaced by a subsequent innocent purchaser without notice, whose conveyance is duly registered.

It seems to me that the only reasonable construction of s. 50 is, that where property under the value of Rs. 100 is purchased by two innocent purchasers, the one by a registered, and the other by an unregistered deed, and there is no fraud shown, or other circumstances which in equity would protect the unregistered purchaser against the registered, the title of the latter shall prevail.

This appears to have been decided by several cases in this Court, to which our attention has been directed.

The first was the case of *Gooroo Dass Dan* v. *Koosoom Koomaree Dassee* (1), decided under s. 68 of Act XVI of 1864, which contains a similar provision to s. 50 of Act VIII of 1871. In that case it was held, that the defendant's registered deed, though subsequent in date to the unregistered deed of the plaintiff, must have the priority.

This ruling was followed in the case of *Gobind Chunder Roy* v. *Poorno Chunder Sein* (2); which is a decision to the same effect under the same Act, and by the case of *Soodharam Bhuttacharjee* v. *Obhoy Chunder Bundopadhya* (3), decided under s. 50 of Act XX of 1866, which is similar in terms to s. 50 of the Act of 1871, and the reasoning of the Judges in the case of *Shaikh Ryasatulla* v. *Doorga Churn Pal* (4), is also to the same effect.

The same point has been decided in the same way under the Act of 1871 by the High Court of Bombay in the case of *Panha Khumaji* v. *Fatta Upaji* (5).

Against this current of authorities the only case in point to which we have been referred, is a decision of Glover, J., in *Narain Doss* v. *Gunga Ram Dharah* (6), which, though, no doubt, directly contrary to the rulings above referred to, appears to have proceeded upon a misapprehension of the true meaning of the judgment in the case of *Nursingh Poorkuet* v. *Bikrum Majee* (7).

(1) 9 W. R., 547.
(2) 10 W. R., 36.
(3) 10 B. L. R., 380.
(4) 15 B. L. R., 296.
(5) 12 Bom. H. C. R, A. C., 179.
(6) 20 W. R., 287.
(7) 14 W. R., 250.

This latter case, which was decided by Jackson and Dwarkanath Mitter, J. J., proceeded, not upon s. 50, but upon s. 48, of the Act of 1866; that section is similar in terms to s. 48 of the Act of 1871, and it does not apply to the case of two deeds conveying the same property, one registered, and other not, but to the case of an oral agreement for purchase coupled with possession of the property on the one hand, and a subsequent registered deed relating to the same property on the other.

An oral agreement for the sale or letting of land, coupled with possession, is protected by s. 48 as against a subsequent registered deed; and there is good reason in this, because an oral agreement is, of course, not capable of registration, whereas the purchaser under a written conveyance can always register it, if he pleases, and so give the public notice that he has become the purchaser. The law does not oblige him to register, but if he omits to do so, he runs the risk of having his title displaced by a subsequent registered purchaser without notice.

Another case, *Salim Shaikh* v. *Boidonath Ghuttuck* (1), decided by Jackson and Markby, J. J., arose also under s. 48 of Act XX of 1866, and is, therefore, inapplicable to the present.

It certainly seems to have been the opinion of Mr. Justice Markby, in more than one of the authorities to which we have referred, that a purchaser under an unregistered deed, who has obtained possession, would have priority as against a subsequent purchaser under a registered deed; and this point appears to have been directly decided by the same learned Judge and Mr. Justice Prinsep in an unreported case, Special Appeal, No. 1122 of 1876, but I doubt whether this doctrine (stated broadly) is in accordance with the provisions of s. 50 of the Registration Act. That section certainly contains no qualification of the kind, and I consider that the Court is not at liberty to import one.

If, indeed, it could be shewn, that the subsequent purchaser under the registered instrument had notice of the conveyance by the prior unregistered deed, then the equitable doctrine which obtains in like cases in England, and which is explained in the case of *Le Neve* v. *Le Neve* (2), might prevent the registered purchaser from asserting his rights against the unregistered under s. 50.

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(1) 12 W. R., 217; S. C., 3 B. L. R., 312.

(2) 3 Atk., 646; and 2 White and Tudor's L. C., 34.

But in this case no question of equity, nor of the defendant having been put into possession under his alleged deed, arises.

No suggestion of the kind was made by the defendant in either of the lower Courts, and the possession which he held, after the deed was executed, was perfectly consistent with his previous position as tenant to the plaintiff's vendor under his own kabuliat.

That kabuliat was produced at the trial by the plaintiff's vendor himself, and this fact is directly opposed to the defendant's contention, because, if he had purchased the property honestly by a bill of sale, the kabuliat, which he had previously given, ought in regular course to have been returned to him.

We must take it, therefore, that the case with which we have to deal now, is one between two innocent purchasers, one of whom has, and the other has not, registered his deed of conveyance; and I think that the only reasonable way in which we can give any effect to the provisions of s. 50 is by allowing the plaintiff's registered deed a priority over that of the defendant. As my learned brother is also of this opinion, the judgment of this Court will be reversed, the judgment of the lower Court will be restored, and the plaintiff's suit will be decreed with costs in all the Courts.

Pontifex, J.—Passed a substantially concurring judgment with a certain difference as to the application of s. 50, as will be found in the head-note.

CALCUTTA HIGH COURT.

THE 30TH AUGUST 1879.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

SHEO PERSHAD SINGH* *(Plaintiff)*

versus

KALLY DASS SINGH and others *(Defendants).*

Mokurari Ijara—Words of Inheritance—Lease for Life—Hereditary Tenure—Reg. XLIV of 1793—*Reg. V of* 1812—*Reg. VIII of* 1819.

In 1798 a mokurari potta of a portion of a Zemindari was granted to *A* at a consolidated jumma of Rs. 6 for the term of four years, and at a uniform rent of Rs. 25 from the expiration of that period, to be paid year after year. The potta provided that the mokuraridar should make improvements; that profits arising therefrom should belong to him, and not to the grantor; and that he should not dispose of any portion of the land

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* I. L. R., 5 Calc. 543.

granted without the permission of the grantor. No words of inheritance were used in the grant. The grantee died in 1875, when the heirs of the grantor sued to recover possession of the estate from the heirs and assigns of *A*. The defendants contended, that the grant was transferable and hereditary, and that *A*, his heirs, and assigns were entitled to it in perpetuity.

Held, that the grant was for the life of *A* only, and not in perpetuity.

The use of the word "mokurari" alone in a lease raises no presumption that the tenure was intended to be hereditary, and, therefore, in order to decide whether a mokurari lease is hereditary, the Court must consider the other terms of the instrument under which it is granted, the circumstances under which it was made, and the intention of the parties.

Garth, C. J. (In delivering the judgment of the Court said) :—

The sole question, therefore, in this case, is, whether the potta was intended to be in perpetuity, or only for the life of the grantee. It is granted by the raja to Roghu Nath Singh under the description of the "mokurari ijaradar," of Mouza Bhalwana. It states that the mokurari ijara potta of the mouza is thereby granted to Roghu Nath from 1206 Fuslee at a consolidated jumma of Rs. 6 for the years 1206, 1207, 1208, and 1209, and at a uniform rent of sicca Rs. 25 from the year 1210, to be paid year after year. It provides that this rent shall be inclusive of malikana, and that the mokuraridar should, with ease of mind, make cultivation and improvements, and pay the rent year after year to the raja, raising no objection on the score of drought, inundation, &c.; but should himself bear the loss arising therefrom. It further provides, that any profit to be derived from salutary improvements should belong to the mokuraridar, and not to the raja ; that the mokuraridar should treat the tenants well, and should not give a single span of land in the village without asking permission of the raja, nor resume any land previously granted, without the raja's orders; and that, should the lakhiraj lands be resumed under the raja's orders, and should the raja be pleased to make a settlement of the land with the ticca mokuraridars, the latter should pay the rent according to the settlement to be made with the raja. It then provides, that the mokuraridar should not suffer a single span of the land on the limits and boundaries to pass away from the estate, or to be included in the boundary of other persons ; and that, should anything of the kind happen, the raja should be informed of it, and the matter should be settled with the "aid of the raja, and the boundaries of the mouza preserved and confirmed ; and further, that the mokurarider should not allow robbers and bad

characters to settle within the ticca, and that he should act in strict conformity with the orders passed and to be passed by the raja for the payment of rents by tenant and malguzari of all classes." The plaintiff contends, that the instrument in itself does not confer an hereditary estate, and that there is nothing in the terms of it, or in the circumstances under which it was granted, to lead to the supposition that it was intended to be of an hereditary character, or extending beyond the life of the mokuraridar. The defendants, on the other hand, contend, that the mere fact of its being a mokurari potta, is sufficient to raise a *primâ facie* presumption in favor of its being hereditary; and that the terms of the instrument, the circumstances under which it was granted, and the subsequent conduct of the parties, all tend to strengthen that presumption. There certainly is one peculiarity about this case, which distinguishes it from most others of a similar character which have come under the consideration of the courts, namely, that, notwithstanding the potta was granted some eighty years ago, the original grantee has lived until the year 1875, and the question as to the effect of the instrument has arisen immediately upon his death; so that we have here no usage or course of succession to guide us, which has served in some cases as a means of interpreting the intention of the parties, and has been held to supply the omission of words of inheritance; see *Dhunput Singh* vs. *Gooman Singh*(1) and the case of *Joba Singh*(2). We must, therefore, look mainly to the terms of the instrument itself, and to the circumstances under which it was made, in order to see whether there is any reason for holding that it conferred an hereditary tenure. The Subordinate Judge very properly observes, that in the word "mokurari" itself, there is nothing which necessarily imports perpetuity. In several cases decided by the Sudder Dewany Adawlat, it was held, that "mokurari," even when coupled with "istemrari," did not denote an hereditary estate, and although [as was said by a Division Bench of this Court in the case of *Lakhoo Koer* vs. *Hurree Kishen Roy*(3)] the decisons of the Court of Sudder Dewany Adawlat may not be absolutely binding upon the High Court here, it seems to us that they are entitled to great respect, especially when they relate to a technical expression in a lease, the use and meaning of which was understood at least as well, thirty or

(1) 11 Moore's I. A., 433; S. C., 9 W. R., P. C., 3. (2) 4 Sel. Rep., 271.
(3) 12 W. R., 3.

forty years ago, as it is now. The learned Judges in that case considered that the words "mokurari istemrari" did not confer a lease in perpetuity, and the same construction appears to have been put upon them by Trevor and Campbell, J. J., in the case of *Monorunjun Singh* vs. *Rajah Lelanund Singh*(1).

In this last case a review was applied for(2), upon the ground that the learned Judges had not correctly apprehended the meaning of word "istemrari." They had considered it as meaning "perpetual in point of time;" and to that construction they adhered. On appeal(3), however, from that decision to the Privy Council, their Lordships held, that the words "mokurari istemrari" might mean "either permanent during the life of the person to whom the grant was made, or permanent as regards hereditary descent;" but that in that particular case, coupling the words with the usage that had prevailed, the tenures were hereditary. In this case the word "istemrari," which is relied upon on the above authorities, as importing perpetuity, is not used; and with regard to the meaning of the word "mokurari" alone, their Lordships of the Privy Council, in the case of the *Bengal Government* vs. *Nawab Juffer Hossein Khan*(4), say thus:—"It was intimated in one of the precedents cited, that the word 'mokurari' may import perpetuity, but their Lordships apprehend that, although the word may have that import, this is not the necessary meaning of the word, and they are satisfied that, as used in the documents in this case, it has not that import." As, therefore, the word "mokurari" alone raises no presumption that the tenure was intended to be hereditary, we must see whether, having regard to the other terms of the instrument, the circumstances under which it was made, or the conduct of the parties, we have reason to suppose that in this instance the potta was intended to be hereditary. The Subordinate Judge has held that it is so principally for these reasons:—He says, that as the gross produce of the village was put down in the year 1250 at Rs. 6-3-10, and as the entire area of the mouza was found in 1846 to be 7,500 bighas, of which 3,000 were cultivated and 4,500 covered with jungle, it must be taken that, when the potta was granted, the larger portion of the mouza was covered with jungle,

(1) 3 W. R., 84. (2) See 5 W. R., 101. (3) 13 B. L. R., 124, 138.
(4) 5 Moore's I. A., 467.

and that the lease was granted with a view to large improvements being made, and a good deal of money being laid out by the grantee; and he further finds as a fact, that the property has been largely improved by the grantee, and that the latter would not have laid out so much money upon it, unless he held it in perpetuity. The Subordinate Judge also lays some stress upon the subsequent conduct of the parties. It appears that, upon the death of Raja Gopal Singh, who granted the potta, his son Raja Jeswant Singh declined to receive the rent of this mouza from Roghu Nath under the potta in question, contending that one Seolal Singh, who was Roghu Nath's uncle and guardian, had surrendered that potta to Raja Gopal Sing, and had taken from him another ticca potta on behalf of Roghu Nath at a rent of Rs. 51, and for a term of eleven years. In the proceedings which were taken to try that question, Roghu Nath was successful, the Judge considering that Roghu Nath held the property under the potta of 1798. The same point was afterwards raised in a regular suit by Raja Nowab Singh, the successor of Raja Jeswant Singh. He sued Roghu Nath under the alleged eleven years' lease for the rent of Rs. 51, and in that case Roghu Nath set up the potta of 1798. In the first Court the raja was successful, but on appeal to the Judge, the decision was reversed, and Roghu Nath was adjudged to hold under the mokurari potta. The Judge says,—"The appellant took the said mouza in mokurari from the respondent's father at a small rent, when he had to clear it of jungle and bring it into cultivation and has now reclaimed and brought it into cultivation at a considerable outlay, and has not yet reaped benefit commensurate with the expenses incurred by him," and the decree was, that the appellant should remain in possession of mouza Bhalwana in accordance with the mokurari potta. The Subordinate Judge in the present case appears to attribute some weight to the above judgment, as showing that at that time Roghu Nath had brought the mouza into cultivation at heavy expense; and that Roghu Nath himself considered and described his interest as a permanent one. We think it clear, however, that we can only use this judgment for what it really decided, namely, that Roghu Nath was decreed to pay the Rs. 25 rent, and not the Rs. 51; or in other words, that he held under the potta in question, and not under the potta set up by the raja. The Judge did not mean to decide,

nor could he have decided in that suit, that the potta conveyed an hereditary tenure, and we think the word "permanent" is used in the judgment to describe the mokurari potta as distinguished from the ticca potta for eleven years only. The Subordinate Judge is of course quite right in saying that the lease was granted with a view to the improvement of the mouza. The potta in fact says so in plain terms. It was not at all likely that the raja would have granted so large a property, even for the life of the grantee, at little more than a nominal rent, unless with a view to some advantage for himself; and the only advantage which he apparently obtained, or could obtain, in this instance, consisted in the improvments to be made by the grantee. The area of the estate seems to be no less than 7,500 bighas. The value of it at the present time is estimated at Rs. 1,00,000. Roghu Nath was a minor at the time when the potta was made; and, therefore, in the ordinary course of things, a lease for life of such a property at such a rent would be a most advantageous bargain for the grantee. He was not bound down to any particular measure of improvement. If his life was a short one, the improvements which he effected would probably be but few. The longer his life, the more improvements he would probably carry out, and the greater in such case would be his own gain. He might use his own discretion in that respect; but under no circumstances, having regard to the smallness of the rent and the fact that he paid no premium, would, if he were an ordinarily prudent man, be a loser. But, on the other hand, if the tenure was to be in perpetuity, what advantage could the raja or his successors ever expect to get from it? He would then have parted for ever with this valuable property at a nominal rent of Rs. 25. The Subordinate Judge says, that the consideration for this grant was the improvement to be made by the grantee. But how could this improvement be any benefit or consideration to the grantor or his heirs, if the grant were to be made in perpetuity? In that case the grantee would secure the whole benefit of them; and the grantor would get nothing, let the property be increased in value ever so much, except his Rs. 25 a year. In most other cases of this kind, where leases have been held to be hereditary, either the rent reserved has been a substantial one, or a considerable premium has been paid to the grantors. But here the grantor, if the potta were construed as hereditary, would be

parting with his property for no consideration whatever. It is strange that this view of the matter seems wholly to have escaped the notice of the Subordinate Judge. If any other argument were wanting to induce us to find in favor of the plaintiff, it would be supplied by some of the other provisions of the lease, which seem necessarily to imply that a substantial interest in the property remained in the raja, and which are quite inconsistent with his having permanently parted with that interest. If the grant was in perpetuity, why was the permission of the raja necessary, before a single span of land in the mouza could be parted with to any body? Why was the raja to be consulted in the adjustmeut of boundary disputes with neighbouring proprietors? Why should there be any provision for securing the tenants of the mouza in their holdings, and giving the tenants proper receipts upon payment of their rents? All these would be very important stipulations for the raja, if the grant were to be for the life of the grantee, but would be wholly, or almost wholly, immaterial if the raja's interest in the estate were only the possibility of an escheat at some future time. For these reasons, we are clearly of opinion that the judgment of the Court below is wrong. * * * * * * *

CALCUTTA HIGH COURT.

THE 10TH DECEMBER 1879.

Before Mr. Justice Morris and Justice Prinsep.

RAM MANICKYA DEY* *(Defendant)*

versus

JUGGUNNATH GOPE and others *(Plaintiffs).*

Execution of Decree for Mesne Profits—Subsequent Mesne Profits.

Where a decree is silent as to the date up to which mesne profits are to run, and merely gives a decree for possession with mesne profits, those mesne profits can only be reckoned, for the purposes of assessment in execution, up to the date of the institution of the suit.

Sadasiva Pillai v. *Ramalinga Pillai* (1) and *Wise* v. *Rajendro Coomar Roy*(2) followed.

THE judgment of the Court (Morris and Prinsep, J. J.) was delivered by—

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* *Vide* I. L. R., 5 Calc. 563.

(1) L. R., 2, I. A., 219. (2) 11 W. R., 200.

Morris, J.—In our opinion the Lower Appellate Court has put a wrong interpretation upon the decree of the 6th July 1871, and has thereby extended the period for which the judgment-creditor is entitled to mesne profits.

The decree is silent as to the date up to which mesne profits are to run. It merely says that mesne profits are to be ascertained and realized on a specified quantity of land at the time of execution of the decree. The Judge on this point observes :—"The appellant, as judgment-debtor, is quite mistaken in supposing that in the decree there are any words of limitation which would exclude the decree-holder from the items under objection. Taking the decretal order as a whole, and reading it in connection with the subsequent proceedings, I cannot help thinking that the present interpretation now set up is an after-thought."

Then the Judge admits that there are no terms in the decree which limit or define the period for which the judgment-debtor is liable for mesne profits. He, therefore, thinks that the Court in execution is at liberty to interpret the decree as giving a latitude in the matter of mesne profits, which cannot be gathered from its express terms. But by so doing, he appears to us to have overlooked what the Privy Council in the Madras case of *Sadasiva Pillai* v. *Ramalinga Pillai*(1) has declared to be settled law on the subject, namely, "that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits."

And secondly, "that the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit." Nor can any argument in favor of extention of time be derived from those words of the decree which declare that the Court at the time of execution is to ascertain the mesne profits. On this point the judgment of Sir B. Peacock, in the case of *Wise* v. *Rajendro Coomar Roy*(2), seems to us to be clear, and it is in accordance with the previous Full Bench ruling of this Court in the case of *Mosoodun Lall* v. *Bheeharee Singh* (3). Sir B. Peacock says :—"To order mesne profits to be assessed in execution without specifying the period for which those

(1) L. R., 2, I. A , 219. (2) 11 W. R., 200.
(3) B. L. R., Sup. Vol., 602 ; S. C., 6 W. R., Mis., 109.

mesne profits are to be assessed, would be to depute to the Court of execution power to try the case, and in many cases the most essential part of it. If this were otherwise, in a suit merely for mesne profits a general order might be passed that they are to be assessed in execution."

In this view of the law, we are of opinion that, inasmuch as the decree of 1871 is silent on the point, and as it merely gives a decree for possession with mesne profits, those mesne profits can only be reckoned for the purposes of assessment in execution up to the date of the institution of the suit; consequently, the judgment-debtor is entitled to a refund of the monies which are comprised in the items 3, 4, 5, 6, 7, and 8, in the judgment of the Lower Court.

Appeal allowed.

CALCUTTA HIGH COURT.

THE 24TH JULY 1879.

Before Mr. Justice Romesh Chunder Mitter and Mr. Justice Tottenham.

KRISHTO LALL GHOSE* (*Defendant*)

versus

BONOMALEE ROY and another (*Plaintiffs*).

Evidence—Admissibility of Document requiring Registration—Divisible Transaction.

When a transaction is indivisible, and the registration of the document evidencing it is, by law, compulsory, the document will not be admissible in evidence if not duly registered; but when the transaction is divisible, as when upon a loan of money, it is agreed—(i) that the loan shall be secured by a bond containing a covenant for repayment of the sum advanced with interest within a certain time; and also (ii) that certain designated property shall be hypothecated as collateral security for the repayment of the loan, —the same rule does not apply, and an unregistered bond for the amount advanced, with interest, containing a further provision that as collateral security for the amount advanced certain property should remain hypothecated, may be used as evidence of the loan although inadmissible to prove the hypothecation.

Sreemutty Matonginy Dassee v. *Ramnarain Sadkhan* (2 C. L. R., 428) distinguished. *Luchmiput Singh Dugor* v. *Mirza Khairat Ali* (4 B. L. R. F. B., 18) followed.

THE judgment of the Court (Mitter and Tottenham, J. J.) was delivered by—

Mitter, J.—We do not see any reason for interference in this case.

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* *Vide* I. L. R., 5 Calc. 611.

The only point that we need notice is, that one of the bonds filed by the plaintiffs, *viz.*, the bond for Rs. 599, not having been registered, was not admissible in evidence. This bond is dated the 8th Joist 1283 (20th May 1876). In support of this contention, the case of *Sreemutty Matonginy Dassee* v. *Ramnarain Sadkhan*(1) has been cited. It appears to us that that case is quite distinguishable. On the other hand, the present case seems to us to be governed by the Full Bench decision in the case of *Luchmiput Singh Dugor* v. *Mirza Khairat Ali*(2) referred to in the decision cited before us, and which was distinguished by the learned Judges who passed it from the case which was then before them. The distinction between this case and the Full Bench decision referred to above, and the case cited before us, is as shown by the learned Judges, that where the transaction is indivisible, and the registration of the document evidencing that transaction is compulsory, there the document is not admissible in evidence if it is not registered; but where the transaction is divisible, the same strict rule does not apply. For example, in this case the document upon which the plaintiffs rely, is in the nature of a bond by which the defendant agreed to pay a certain sum of money with interest to the plaintiffs. It further provides that as collateral security for the loan advanced a certain property should remain hypothecated. This document for want of registration would not be operative as regards the hypothecation, but it is admissible in evidence to prove that the defendant was liable for the loan advanced under it.

For these reasons, we are of opinion that there is no force in this contention. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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(1) 2 C. L. R., 428. (2) 4 B. L., (F. B.) 18.

CALCUTTA HIGH COURT.

THE 13TH AUGUST 1879.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

ABDUR ROHOMAN* and others (*Petitioners*)
versus
SAKHINA and others (*Respondents*).

SOCHAN *vs.* SHUBRATON.

OSSUFF *vs.* SHAMA.

Presidency Magistrate's Act (IV of 1877), ss. 234, 235—Maintenance—Effect of Divorce on Maintenance Order.

A Presidency Magistrate is competent to stay an order for maintenance granted under s. 234, Act IV of 1877, and to refuse to issue his warrant under the 3rd clause of that section, and to try all questions raised before him which affect the right of a woman to receive maintenance. There can be no distinction raised between a dissolution of marriage obtained under the Indian Divorce Act and a dissolution obtained under the Mahomedan law. It is only on proof of the existence of the relationship of husband and wife, that a Magistrate can make an order under s. 234, granting maintenance to a wife; but where proof has been given that such relationship has ceased to exist, he may stay an order already made under that section.

THE opinion of the Court (Ainslie and McDonell, J. J.) was given by—

Ainslie, J.—In our opinion a Magistrate is competent to stay the operation of an order for maintenance of a wife made under s. 234, Act IV, 1877, and to refuse to issue his warrant under the 3rd. clause of that section, although he cannot formally cancel the order, which must be taken to have been a legal and proper order when it was made, and he is competent to try all questions raised before him which affect the right of a woman to receive maintenance. This is the view taken by the Bombay High Court in the case cited in the reference [*in re Kasam Pirbhai* (1)]. The Court, in the exercise of its criminal jurisdiction, enquired into the facts and legality of the divorce then alleged, and, having found that there had been a legal divorce, it declared that the Magistrate ought not to issue an attachment upon or otherwise to execute the order, it being in fact *functus officio.*

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* *Vide* I. L. R., 5 Calc. 558. (1) 8 Bom. H. C. Rep., 95.

The power of the Magistrate to act in this way does not, in our opinion, arise from the change in the provisions of s. 80, Beng. Act IV of 1866, introduced by s. 235, Act IV, 1877, and does not depend upon the expression "may make such alteration in the allowance ordered as he thinks fit." These words, read with the proviso which immediately follows them—'provided the monthly rate of fifty be not exceeded,' and with the provisions of the earlier law, which only admitted of reduction of the amount ordered, and gave no authority to a Magistrate to increase such amount on proof of a favourable change of the circumstances of the person ordered to pay—seem to us to be intended only to vest in a Magistrate a power to revise any order of maintenance previously made on proof of change of circumstances with a view to alter the amount to that which may be appropriate under the new circumstances.

It is not, we think, doubted by the learned Magistrates, who have made this reference, that an order of dissolution of marriage under the Indian Divorce Act would put an end to the operation of a Magistrate's order for maintenance; but they seem to draw a distinction between the case of persons subject to the Divorce Act, and Mahomedans who can exercise the power of divorce at their own pleasure and without the intervention of any Court. This distinction cannot, in our opinion, be maintained, whether the dissolution of the bond of marriage is capable of being effected in one way or in another; when once validly effected, it must operate to stop the operation of a Magistrate's order made in favor of a wife. With the cessation of the conjugal relation, the responsibilities attaching thereto cease. It is only on proof of the existence of this relation (we have not now to deal with the case of children) that a Magistrate can make any order at all, and any order made is to be for a monthly allowance for the maintenance of a wife, and it is as wife that the woman is to continue to receive an allowance; the last clause of s. 234, which is so worded as to apply either before or after an order for maintenance is made, shows that conduct inconsistent with her duties as wife will take away her right to receive it, even while the conjugal relation remains undissolved.

If a woman makes an application to a Magistrate for an order for maintenance against her husband, she must, if the relation of husband and wife is disputed, prove its existence. It may, perhaps, be admitted that there had been a marriage, but alleged that it had

been dissolved. A Magistrate must, of necessity, enquire into the fact of marriage in the one case, and into the fact of dissolution of marriage in the other; and we find that, in one of the cases referred to, the learned Chief Magistrate did try the plea of divorce. Unless the woman making the application is a wife, he has no power to make an order of maintenance. In the case of alleged divorce, the divorce must be proved, whether the parties are Christians or Mahomedans; the means of proof are different, but the mode of procedure, as far as the Magistrate is concerned, is the same: he is to determine on evidence whether the allegation of divorce is true. In the one case, the only possible mode of divorce is by a decree of a competent Court, and the decree is conclusive as evidence; in the other, recourse to a Court is wholly unnecessary, and unless it should happen that the question has been already decided between the parties in a competent Court, the Magistrate must draw his own conclusions from the oral and other evidence put before him as best he may.

The fact that the power of divorce, given by the Mahomedan law, may be so exercised as to defeat the intention of the legislator, as expressed in s. 234, Act IV of 1877, and other similar enactments, may go to show that further legislation is required, but it cannot affect the law as it stands. It has been said by the learned pleader who appeared before us on behalf of the petitioners to the Magistrate that the right of exact payment of dower, immediately on dissolution of marriage, is a sufficient check to the abuse of that power: this, however, is not matter for present consideration.

In our opinion, it is, under the terms of s. 234, as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and, consequently, for the purposes of Chap. XVIII of the Presidency Magistrate's Act of 1877, a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution.

CALCUTTA HIGH COURT.

THE 12TH DECEMBER 1879.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

BHARRUT CHANDER ROY* *(Plaintiff)*

versus

CALLY DASS DEY and others *(Defendants).*

Co-sharers of Land—Arrangement for separate Payment of Rent—Suit for Arrears of Rent at Enhanced Rates—Beng. Act VIII of 1869, *s.* 29.

One co-sharer cannot (even if he make his co-sharers parties to his suit) sue for the enhancement of his share of the rent, such an enhancement being inconsistent with the continuance of the lease of the entire tenure.

THIS was a suit for arrears of rent at enhanced rates. The plaint stated that the plaintiff was a co-sharer of certain property; that in accordance, however, with an arrangement arrived at between himself and his co-sharers, he had been hitherto in the habit of receiving the rents of a certain definite portion of these lands, which were paid separately to him; that, for reasons in the plaint stated, he was entitled to recover arrears of rent at enhanced rates from the tenants of these lands, and had, therefore, instituted the present suit against such tenants, having also made his co-sharers defendants in the case. On the part of the defendants it was contended, *inter alia,* that the plaintiff, being the owner of an eight-anna share of a joint undivided taluq, could not, in such capacity, sue for the enhancement of fractional share of the rents due under the lease; that such suit could only lie when all the co-sharers were plaintiffs, and when the enhancement sought for was in respect of the whole of the rents comprised in the tenancy.

The Court of first instance overruled this objection, on the ground that, inasmuch as the plaintiff's co-sharers had been made co-defendants in the suit, and it had been proved that the plaintiff had been in the habit of realizing separate rents, he had, therefore, on the authority of *Guni Mahomed* v. *Moran* (1), a right to sue for enhancement of rent. On the facts, the Court found in favor of the plaintiff and granted a decree. The Lower Appellate Court being of opinion that the case quoted by the Lower Court was an authority

* *Vide* I. L. R., 5 Calc., 574.

(1) I. L. R., 4 Calc., 96; S. C., 2 C. L. R., 370.

against the contention, that a share-holder is entitled to sue for the enhancement of a fractional share of the whole rent, reversed the decision of the Court of first instance.

The plaintiff appealed to the High Court.

Baboo Lolit Chunder Bose for the appellant.

Baboos Doorga Mohun Das and Kali Churn Banerjee for the respondents.

The judgment of the Court (Jackson and Tottenham, J. J.) was delivered by—

Jackson, J.—The present suit was brought by the plaintiff, who is a co-sharer in a certain khas chuck in the Sunderbuns, against the defendants Nos. 1 to 7, as principal defendants and under-tenants, and against the defendants Nos. 8, 9, and 10, who appear to have been co-sharers in the chuck, for the purpose of obtaining from the principal defendants arrears of rent at an enhanced rate agreeably to notice. It is alleged, and for the purposes of this appeal we may assume it to be correct, that the plaintiff had previously been accustomed to recover rent separately from his co-sharers.

The defendants raised various pleas; the first of them was, that the suit was improperly framed, as being a suit to enhance the rent of a moiety of the defendants' tenure. That question was embodied in the second of the four issues framed in the Court of first instance, "whether the plaintiff, being one of several proprietors, can bring a suit for enhancement of rent."

The Munsiff's decision upon the point was in these words—" The objection of the defendant has no weight, inasmuch as the plaintiff's co-sharers have been made co-defendants, and it has been proved that the plaintiff has been in the habit of realizing separate rents. According to the Full Bench ruling in the case of *Doorga Prosad Mytee* v. *Joynarain Hajrah*,* the plaintiff, who is one of several proprietors, having made separate collections of rent, can sue for enhancement of rent." In that way the Munsiff very shortly states what he considers to be the effect of the Full Bench ruling, and then he passes on to another part of the case. The result was that he gave the plaintiff a decree for rent at rupees 261, with costs.

The defendants appealed, and the appeal coming before the Subordinate Judge, he says thus : " This appeal and appeal No. 53 being of the same nature, have been tried together. According to

* I. L. R., 4 Calc., 96; S. C., 2 C. L. R., 370.

the Full Bench Ruling of the Hon'ble High Court, as noted in the margin [*Doorga Prosad Mytee* v. *Joynarain Hajrah* and *Guni Mahomed* v. *Moran* (1)], the plaintiff is not entitled to sue to enhance the rent in respect of eight annas share out of the whole sixteen annas of a taluq. According to the purport of those precedents, the plaintiff's claim being deemed fit to be dismissed, it is ordered that the appeals be decreed, &c."

Now it must be admitted that this was not a satisfactory judgment, because the Munsiff having apparently had the very same decisions before him, and having held upon those rulings that the plaintiff was entitled to succeed, the Appellate Court ought certainly to have pointed out where the Munsiff's error lay, and ought to have shown how it held that the plaintiff's suit must fail. It happens, however, that the Lower Appellate Court is right in fact, but in consequence of its omission, it becomes necessary for us to point out how the plaintiff's suit must fail. The cases before the Full Bench were referred with two specific questions: firstly, "whether the izaradar of a co-sharer of an undivided estate, who has made separate collections from the tenants of the whole estate in respect of his share, can sue to obtain a kabuliat at an enhanced rent for his share of the tenure, the other co-sharers not being made parties to the suit." Secondly, "whether the izaradar of a co-sharer of an entire tenure, who has for some time realized his rent separately in respect of his share, can sue to enhance the rent of that share, separately without joining the other co-sharers of the tenure." No doubt, in these two questions it was assumed that the other co-sharers had not been made parties to the suit, and as the judgment of the Full Bench commences with the statement "we think that both questions referred to us should be answered in the negative," it may be, that the Munsiff considered that the plaintiff, as he had been in the habit of realizing separate rent, and as he had made his co-sharers parties to the suit, might recover. But if he had read the judgment carefully, he would have found that the learned Judges of the Full Bench went beyond the questions referred to them, and laid it down distinctly that such a suit as the present could not be brought. "The right of one co-sharer," they observe, "to enhance the rent of his share separately, must be governed by the same principles as his right to a kabuliat. The Rent Law, in our opinion, does not

(1) I. L. R., 4 Calc., 96; S. C 2 C. L. R., 370.

contemplate the enhancement of a part of an entire rent; and the enhancement of a separate share is inconsistent with the continuance of the lease of the entire tenure." Now there is no allegation, as I understand, in this case, that the lease of the entire tenure under which the defendants held had come to an end, so that that state of things had not been brought about in which the under-tenants and the separate co-sharers were at liberty to enter into divers separate contracts. As far as we can see in this case, the tenure as originally created still subsists. The only modification of it is, that, by the course of dealings between the parties, the plaintiff has been accustomed to recover his share of the rent separately. Therefore, if there was any wish on the part of the plaintiff, or any other party to this contract to vary its terms, that could have been done by bringing the whole of the parties before the Court, and bringing the contract as a whole before the Court. The plaintiff is not at liberty to bring a suit merely to enhance his share of the rent. We think, therefore, that the Full Bench Ruling does apply to the facts and circumstances of this case, and that the appeal must be dismissed with costs.

CALCUTTA HIGH COURT.

THE 16TH AUGUST 1879.

Before Mr. Justice Wilson.

RADHAKISSEN ROWRA DAKNA* *versus* CHOONEELALL DUTT.

Registration—Denial of Execution, what is—Suit to Compel Registration—Party to Suit—Registration Act (III *of* 1877), *ss.* 34—36, 73—77.

Refusal to admit execution of a document is a denial of execution within the meaning of the Registration Act of 1877, and so also is a wilful refusal or neglect to attend and admit execution; and where such refusal or neglect occurs, a suit will lie under s. 77, for the purpose of having the document registered.

The Registrar is not a necessary party to such a suit.

MR. HILL, instructed by Mr. H. H. Remfry, for the plaintiff.

No one appeared for the defendant. An important point arose in this case upon the construction of the Registration Act of 1877.

The plaintiff in his plaint stated, that on the 27th of September 1878, in Calcutta, the defendant, in consideration of the plaintiff's agreeing to give him six months' time wherein to make payment of a

* I. L. R., 5 Calc., 445.

debt of Rs. 21,000, then due, and payable by him to the plaintiff for jewelry sold and delivered to him by the plaintiff, agreed and contracted with the plaintiff to execute and register a legal mortgage in the usual English form of his share and interest of and in the lands and hereditaments in the second part of the schedule mentioned, for securing repayment of the sum of Rs. 21,000 with interest thereon at 12 per cent. per annum (such mortgage to contain all usual powers of sale and foreclosure), so soon as the same could conveniently be prepared if so required by the plaintiff, and in the meantime to execute and register the indenture of agreement and covenant,

That in pursuance of the above agreement the defendant, on the 27th of September, executed and delivered to the plaintiff the said agreement and covenant, but there being no time to register the same on that day, it was agreed that the defendant should attend at the office of the Registrar of Assurances of Calcutta, and admit the execution thereof as required by law, whenever the plaintiff should so require of him.

That the plaintiff requested the defendant to attend at the office of the said Registrar on the 12th October 1878, and there admit execution of the said indenture in pursuance of his agreement, but the defendant neglected to do so. That the Registrar thereupon at the plaintiff's request duly issued a summons requiring the defendant to attend at his office on the 29th of October 1878, and register the said indenture, and such summons was personally served upon the defendant, but he failed to comply therewith, and a warrant for the arrest of the defendant was thereupon duly issued by the Collector of Calcutta at the instance of the said Registrar, but owing to the defendant keeping out of the way the plaintiff had been unable to have been apprehended and brought before the said Registrar, or to have the said indenture registered. That all times elapsed, all conditions were fufilled and all requirements of the law in force for the registration of assurances were complied with to enable the plaintiff to obtain registration of the said indenture, but in consequence of the defendant not having appeared before the said Registrar, the said Registrar, on the 28th of May 1879, made an order refusing to register the said indenture. That the office of the said Registrar is situate within the local limits of the Ordinary Original Civil Jurisdiction of this Court, and that accordingly the plaintiff's cause of action accrued within such limits and on the 28th of May 1878.

The plaintiff therefore prayed, 1st, that the said indenture may be directed to be registered by the said Registrar, if presented at his office within thirty days after the date of the decree to be made hereon.

2nd, that the defendant may be decreed to pay to the plaintiff all the costs, charges, and expenses incurred by him in and about the execution of the said indenture, and the proceedings taken by him to procure the registration of the same, and also his costs of this suit.

3rd, and that the plaintiff may have such further and other relief as to this Honorable Court, regard being had to the circumstances of this case, may seem fit.

The important question that arose was whether, under the above circumstances, the present suit would lie, as brought under s. 77 of the Registration Act of 1877.

The following is the judgment of the Court :—

Wilson, J.—This case raises a point upon the construction of the Registration Act, 1877. The suit is brought under s. 77 of the Act, and the plaintiff asks for a decree against the defendant ordering the registration of a deed of mortgage executed by the defendant in favor of the plaintiff. The due execution of the deed by the defendant on the 27th of September 1878 was clearly proved. It was presented for registration to the Registrar for Calcutta on the 12th of October following. The defendant not appearing to admit execution, a summons was issued against him on the same day. The summons was served personally, and that he perfectly understood its object is clear, because it is in evidence that, when served, he said, "Why have you taken out this summons? I will go personally and register."

He, however, disobeyed the summons and did not at any time attend to admit execution, but kept out of the way to avoid any further process. I am satisfied that the defendant disobeyed the summons, and took the course he did take expressly to avoid admitting execution and so prevent the registration of the deed. The Registrar heard the statements of the witnesses to the execution. A long delay intervened, and ultimately, on the 28th of March 1879, the Registrar refused to register. The question is, whether under these circumstances, the present suit will lie. This depends on several sections of the Registration Act, 1877.

Ss. 34 and 35 give the rules ordinarily to be observed on the presentation of a document for registration, and the cases in which it is and is not to be registered.

Among the cases excepted in s. 34 are those under s. 75 and 77. To understand these latter sections, it is necessary first to read those that immediately precede, namely, ss. 73 and 74, as well as s. 76. These various sections deal in terms only with two cases, that in which execution is admitted, and that in which it is denied: they say nothing of any intermediate case. I think therefore it is reasonable to say that a refusal to admit is a denial within the meaning of the Act.

Again s. 34 excepts cases under ss. 75 and 77 from its provisions, which in other cases rigidly require the attendance before the Registrar of the person by whom the documents purport to have been executed.

It therefore implies, I think, that there may be denial other than an actual denial in the presence of the Registrar. S. 73, dealing with proceedings before a Sub-Registrar, merely speaks of his refusing to register a document on the ground that the person in question "denies its execution." S. 74 says that "in such case, and also where such denial is made before a Registrar in respect of a document presented for registration to him," he may inquire into the fact of execution. This section speaks of a denial before the Registrar. But this means, in my judgment, only a denial in a proceeding before the Registrar.

I have already stated that I think a refusal to admit execution is a denial within the meaning of the Act. I further think that a wilful refusal or neglect to attend and admit execution, in obedience to a summons for that purpose, is a refusal to admit, and therefore a denial.

It follows that in this case there was a denial within the meaning of s. 74; and that the refusal to register was a refusal under s. 76, and therefore this suit is properly brought under s. 77. I do not think the Registrar is a necessary party to the suit. Had there been anything in the circumstances of the case that led me to think he ought to be made a party, I should have adjourned the hearing to allow of this being done.

The decree will be for the plaintiff in terms of the first prayer in the plaint, with costs on scale No. 1.

CALCUTTA HIGH COURT.

THE 1ST JUNE 1880.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris and Mr. Justice Mitter.

Reference to the Full Bench in Regular Appeals Nos. 228, 279, 288, *and* 289 *of* 1878.

LUCHMAN DAS, *(Plaintiff) Appellant*

versus

GIRDHUR CHOWDHARY, By his Mother & Guardian *(Defendant), Respondent.*

Hindu Law—Mitakshara joint family—Ancestral estate, hypothecation of—Rights of members of family —Mortgagee's remedy—Presumption—Res inter alios acta.

In the case of a Mitakshara family, consisting of a father and one minor son, where the father being the manager raised money by hypothecating certain ancestral family-property by bonds, and it is not proved on the one hand, that there was any legal necessity for his raising money, nor, on the other, that the money was raised or expended for immoral or illegal purposes, or that the lender made any inquiry as to the purpose for which it was required, *held*, first, that the mortgage itself upon which the money was raised cannot be enforced, but the mortgagee, if he brings a suit against the father and the son, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.

Secondly, where the minor is the only son, the mortgagee would be entitled to a similar decree against him after the father's death.

Thirdly, where the mortgagee, under such circumstances, brings a suit against the father alone, obtains a decree for the sale of the property, and at the sale buys the property himself, he cannot be considered as a *bonâ fide* purchaser for value, and would not be entitled to the property (except to the extent of the father's interest) as against the infant son.

Fourthly, where the son is an adult and a party to the suit, the mortgagee would be entitled to a decree similar to the one mentioned under the first head.

And fifthly, the whole of the money borrowed would be regarded as having been borrowed to pay an antecedent debt of the father.

Held also that where the managers of a Mitakshara joint family borrow money by hypothecating joint family-property, and in execution of a decree obtained against them the property is sold, and where no evidence is given of the purpose for which the money was raised, the sons of the debtors not being made parties to the suit would be entitled to recover their shares as against the purchaser.

THESE cases were referred to the Full Bench by Garth, C. J., and Mitter, J., with the following opinion :—

In all these cases, the question has arisen in different forms, and under different circumstances, how far in the case of a joint Hindu family governed by Mitakshara law, an alienation of ancestral property by the father of the family is binding upon his sons.

Certain recent decisions of this Court, which are mentioned below, appear to throw some doubt upon the meaning of the rule laid down by the Privy Council, first, in the cases of *Girdhari Lall* v. *Kantoo Lall*, and *Muddun Thakoor* v. *Kantoo Lall* (L. R., 1, Indian Appeals, 321),—and afterwards explained and confirmed in the case of *Ram Sahai* v. *Sheo Pershad Singh* (4, Calcutta Law Reports, 226).

These decisions seem also to be to some extent conflicting *inter se* upon certain points, which it is necessary for us to decide in these cases, and which, therefore, we think it right to refer to a Full Bench as follows :—

1. In the case of a Mitakshara family, consisting of a father and one minor son, where the father (being the manager) raised money by hypothecating certain ancestral family-property by bonds, and it is not proved, on the one hand, that there was any legal necessity for his raising the money, nor on the other, that the money was raised or expended for immoral or illegal purposes, or that the lender made any enquiry as to the purpose for which it was required, can the lender (the mortgagee) enforce by suit, against the father and the son, the payment of his money by sale of the property during the father's lifetime ?

2. Can he do so, under similar circumstances, by suit against the minor after the father's death ?

3. If the mortgagee, under such circumstances, brings a suit against the father alone, obtains a decree for sale of the property, and, at the sale, buys the property himself, is he entitled, as a *bonâ fide* purchaser for value, to hold the property as against the infant son, either during the life or after the death of the father ?

4. Would it make any difference to the right of the mortgagee in any of the above cases, if the son, at the time of the raising of the money, and the giving of the bond, were an adult instead of a minor ?

5. Would it make any difference, if the money were borrowed partly to pay an antecedent debt of the father, and partly for some other unexplained purpose ?

6. Would it make any difference, if in the sale under the decree, the right, title and interest of the father in the property was sold, instead of the entire property ?

7. In the case of a Mitakshara joint family, consisting of two brothers and their sons, the former being the managers, raise money by executing a zur-i-peshgi lease of specific family-property,—the lenders making no enquiry as to the necessity for the loan. Immediately after this, the two brothers take a sub-lease at a rent of the same property from the zur-i-peshgidar, and continue in possession. The rent not being paid, a suit is brought by the zur-i-peshgidar, and a decree is obtained for it against the two brothers; and in execution of the decree, the same property is sold, and the zur-i-peshgidar becomes the purchaser and obtains possession. We find as a fact, that the zur-i-peshgi and the sub-lease were merely a device by the two brothers to raise money, and to continue in possession of the property; but it is not shewn by either side for what purpose the money was raised. Are the sons entitled to recover back the property, or any and what portion or share of it from the purchaser ?

The following cases are the recent decisions of this Court above referred to :—

Adurmonie Deyi v. *Chowdhry Sib Narain Kur* (I. L. R., 3 Calcutta, 1).

Gunga Pershad v. *Sheo Dyal Singh* (V, Cal. Law Reports, 224).

Gonesh Pandey v. *Dabee Doyal Singh* (V, Cal. Law Reports, 36).

Baboo Pursidh Narain Singh and another v. *Lall Hanuman Sahoy* and others (Second Appeal No. 1697 of 1878, decided 28th January 1880, unreported).*

Judgment of the Full Bench.

Having regard to the Law, as laid down by the Privy Council in the cases mentioned in the reference, we think that the questions referred to us should be answered as follows :—

1. The mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee notwithstanding the form of the proceedings would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.

* The case has been since reported in V, Cal. Law Reports, p. 576.

2. Assuming the minor to be the only son, the mortgagee would be entitled to a similar decree against him after the father's death.

3. We think that, under such circumstances, the mortgagee could not be considered as a *bonâ fide* purchaser for value and would not be entitled to the property (except to the extent of the father's interest) as against the infant son.

4. Assuming the adult son to be a party to the suit, the mortgagee would be entitled to a decree similar to that mentioned in the answer to the first question, directing the debt to be raised out of the whole ancestral estate.

5. In the view which we take of the case, the whole of the money borrowed would be an antecedent debt.

6. We consider it unnecessary to answer this question.

7. The sons not being made parties to the suit, they would be entitled to recover their shares as against the purchaser. If they had been made parties, they would apparently have had good defence to the suit upon the merits.

CALCUTTA HIGH COURT.

THE 28TH NOVEMBER 1879.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

THE EMPRESS* *versus* GRISH CHUNDER TALUKDAR.

Witness called by the Court—Right to cross-examine—Evidence Act (I of 1872), s. 165.

Witness summoned on behalf of the prosecution, and not called, ought to be placed in the box for cross-examination, in order that the defence may have the opportunity of exercising this right, and *a fortiori*, if such a witness is called and examined by the Court under s. 165 of the Evidence Act, the prisoner should be allowed to cross-examine.

Jackson, J. (After dealing with the facts of the case, continued):—

Then as to the alleged defect in the procedure of the Court of Session we have no doubt that the Sessions Judge was wrong in refusing to permit the cross-examination of the witness called by the court. The ordinary practice in properly constituted Courts is, that where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him; and certainly, where the Judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination.

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* *Vide* I. L. R., 5 Calc, 614.

CALCUTTA HIGH COURT.

THE 16TH APRIL 1879.

Before Mr. Justice Birch and Mr. Justice Mitter.

GRISH CHUNDER MUNDUL* and another *(Defendants)*
versus
DOORGA DASS and another *(Plaintiffs).*

Priority of Decrees—Surplus proceeds of sale under s. 59 *of Beng. Act VIII of* 1869—*Durpatnidar, Decree against, after sale of his tenure under s.* 59 *of Beng. Act VIII of* 1869—*Suit for refund of money paid under an order of Court not cognizable by Small Cause Court.*

A patnidar caused to be sold the tenure of his durpatnidar, under s. 52 of Beng. Act VIII of 1869, for the arrears of rent due up to 12th April 1876. This sale took place on the 7th November 1876, and after satisfaction of the decree the surplus proceeds remained in the Collectorate to the credit of the durpatnidar. Afterwards in December 1876, the patnidar brought another suit for the durpatni rent due in respect of the period between April and October 1876, and having obtained a decree, attached the surplus proceeds in the Collectorate, which were at the same time attached by two other holders of ordinary decrees.

Held, that the decree of the patnidar, although for rents of the current year, had no priority over the other decrees; and that the surplus proceeds of the sale of the durpatni tenure formed part of the assets of the late durpatnidars and were not hypothecated to the patnidar for the rent of the year current.

Held also, that a suit to recover a refund of monies paid under an order of court is not cognizable by a Court of Small Causes.

Birch, J.—The facts found in this case are, that the plaintiffs obtained a decree against the defendant No. 3 for arrears of rent of a durpatni tenure due up to Choitro 1282 (April 1876), and in execution of that decree brought the tenure to sale on the 7th November 1876. The sale-proceeds amounted to Rs. 1,471, and the plaintiffs' decree for Rs. 211—1—6 was satisfied from the sale-proceeds, the surplus of Rs. 1,259-14-6 being left in deposit in the court. Subsequently the plaintiffs obtained another decree for the rent of the tenure from Bysack to Asin 1283 (April to October 1876) against the same defendants for the first half of 1283, and in taking out execution of that decree, caused the surplus sale-proceeds standing to defendants' credit to be attached. The defendants 1 and 2 held two decrees against the same defendant, and they also attached the surplus sale-proceeds in execution of their decrees. A rateable distribution of the sum in deposit was made by the Court between the three attaching creditors, and under that distribution the plaintiffs. obtained Rs. 556-9-6 as their share. They now brought this suit to recover from the other attaching creditors Rs. 372-12-6, being the

* *Vide* I. L. R., 5 Calc., 494.

difference between the amount of their decrees and what was assigned to them by the rateable distribution. The Munsiff dismissed the suit, holding that the plaintiffs' decree against the defendant No. 3, after the tenure had been sold at their instance, was a mere money-decree, which could give the plaintiffs no .prio rity over other attaching creditors. In appeal, the Subordinate Judge has given the plaintiffs a decree. He says that the tenure was hypothecated for the rent payable to the plaintiffs, and that the surplus sale-proceeds of that tenure are in like manner hypothecated to the plaintiffs; that the same lien exists over the surplus value of the tenure as over the tenure itself, and that, consequently the plaintiff's decree for rent gives him priority over other decree-holders. By his order the defendants 2 and 3 are required to refund to the plaintiffs the amount claimed. A preliminary objection has been taken before us to the hearing of the special appeal. It is contended, that the present suit being cognizable by a Court of Small Causes, no special appeal lies. We do not think, that this contention is valid. The suit is for obtaining a refund of money taken by the defendants under an order of Court which the plaintiffs contend to be erroneous. Such a suit as this is not cognizable by a Court of Small Causes. It seems to us that the Subordinate Judge is quite wrong in saying that the tenure was hypothecated for the rent due thereon, and also in saying that upon the sale-proceeds the same lien exists as upon the tenure itself. After the tenure had been sold for the arrears accruing up to 1282 (1875), the plaintiffs could have no further lien upon it for arrears accruing subsequently. Such arrears must be regarded as a personal debt against the defaulter, to be realized from him by the usual process for the execution of decrees. The surplus sale-proceeds stand to the credit of the defaulter, and like any other assets of his are liable to be attached in execution of outstanding decrees and to be divided rateably amongst the judgment-creditors, who have taken out execution of decrees against the same defendant and not obtained satisfaction thereof. The plaintiffs' claim to priority over other judgment-creditors, by reason of their holding a decree for arrears of rent against the person in whose name the surplus proceeds are held in deposit, is not recognised by law; they stand in no better position than others who may hold personal decrees against the judgment-debtor. The decision of the Subordinate Judge must be set aside, and the order of the Munsiff, dismissing the suit, be restored, the special appeal being decreed with costs.

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THE

LEGAL COMPANION.

September, 1880.

NOTWITHSTANDING the enactment of the Legal Practitioners' Act, the business of the *dalas* or law-touters has not a whit been affected. No doubt, the pleaders do not any more appear to take instructions from any *dalal*, unless he is the *private servant* or the recognized agent of a party, or is himself a party. We have shown in a preceding number of this journal that a *private servant*, according to Blackstone, includes 'a wife, a friend, a relation that use to transact business for a man.' And hence the *dalals* have only to assume and they do, doubtless, assume the character of a "private servant" or a "friend or a relation that use to transact business for a party" or of a "recognized agent," in order, to give instructions to a pleader. Then, s. 64 of the Civil Procedure Code gives them the additional power of making appearances in Court. It says that the defendants are to be summoned to appear (*a*) in person, or (*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or (*c*) by a pleader *accompanied by some other person able to answer all such questions*. Now, *dalals*, when duly instructed, may be quite able to answer all material questions relating to a suit, and, therefore, quite competent to appear in Court by the side of the pleader. So, it is, that their business has not in the least suffered on account of the passing of the Legal Practitioners' Act, although the legal practitioners might not any more appear to share their fees with them. It would therefore be quite premature to expect the early suppression of the profession of the *dalals*, until and unless the present law were so amended as to meet their case.

Mr. Govinda Row has published his Digest of the Indian Law Reports (Complete Series) for 1879. This is the fourth volume of the series published by him. It is very neatly got up by Messrs. Foster and Co., and very cheap. It is needless to state that it is as useful as any of the preceding numbers of the series.

A Full Bench of the N. W. P. High Court has ruled (in the case of Musst. Belaso *vs.* Dino Nath and others decided on the 12th July last) as follows :—

"In an undivided (Hindu) family, consisting of mother and sons, the mother is only entitled to maintenance so long as the family remains undivided in estate, but in case a partition is made, the law gives her a right to assignment of a share in the property left by her husband equal to a son's share. The auction-purchaser of the undivided interest of the son stands strictly in the place of the latter and is bound by obligations which bound his vendor, and the mother's right to an assignment of a share out of the whole joint property will accrue on partition being made, and is of a character which cannot be defeated by the purchaser."

A Division Bench of the Calcutta High Court observed in the case of Dhunraj Marwari *versus* Soruck Ram and others decided on the 18th June last, as follows :—

"In cases of trespass or wrong committed to and upon property, not only the persons by whose hand or hands, the wrong was done but also all persons who ordered or authorized its committal and all persons who aided and abetted its committal are liable to the injured party. He may sue any one or more or all of the above persons and each one is liable to pay the whole of the damages occasioned by the wrong."

A Division Bench of the Calcutta High Court has ruled (in the case of Sreemutty Chundee Dossee *vs.* C. K. Hudson decided on the 2nd April 1880) :—

"A suit to set aside an order under s. 246 of Act VIII. of 1859, instituted against the execution-creditor and judgment-debtors alone after sale of the property in accordance with the order but before the confirmation of sale, is maintainable, though the auction-purchaser is not made a party."

A Division Bench of the Calcutta High Court (Garth, C. J., and Mitter, J.) ruled in the case of Mokundolal Sha *vs.* Sakhat decided on the 11th May 1880, as follows :—

"Where in an account book a balance is struck and acknowledged to be due it should be stamped if the amount due be twenty Rupees or upwards, but the mere want of stamp, though it makes the account book inadmissible as evidence does not prevent the plaintiff from proving his case by any other way, such as, by showing the delivery of goods and price agreed upon."

The above Bench ruled in the case of Sheo Churn Singh *vs.* Fakera Doobay decided on the 8th June 1880, to the following effect :—

"In a suit for the recovery of landed property, where intervenors were allowed to appear and were made defendants but who did not press their claim, and a decree was passed in favor of the plaintiff for the whole property, *held* that the intervenors being parties to the suit were bound by the decree. As between the original defendant and the intervening defendants also, the decree will be a conclusive bar."

PRIVY COUNCIL.

THE 9TH MAY, 1874.

Present :

Sir J. W. Colvile, Sir B. Peacock, Sir. M. E. Smith, Sir R. P. Collier, and Sir L. Peel.

GIRDHAREE LALL* and another *(Appellants,)*

versus

KANTOO LALL, and others *(Respondents.)*

MUDDUN THAKOOR *(Appellant,)*

versus

KANTOO LALL and others, *(Respondents.)*

Mitakshara law—Mithila law—Joint Hindu Family—Alienation by Father—Suit by son—Father's debts payable by sons—Liability of Ancestral Property—Execution Sale.

Ancestral property which descends to a man under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It is a pious duty on the part of the son to pay his father's debts, and the ancestral property in which the son, as son, acquires an interest by birth is liable to the father's debts, unless they have been contracted for immoral purposes. The Mithila law is the same. Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds has been satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale. A son cannot, under the Mithila law, set aside the sale of ancestral property by his father for the discharge of the father's debt, and oust the purchaser.

Whether a son can under the Mitakshara law recover an undivided share of ancestral property sold by his father, *quære.*

Where a Court of Justice has given a decree against a party in favor of a creditor, and has ordered certain property to be set up for sale in execution of the decree, a *bonâ fide* purchaser under the execution, who has paid the purchase-money, is not liable to have the property taken from him on the ground that the decree proceeded upon an erroneous view of the law.

The disputed property formed part of the self-acquired property of one Kunhya Lall, who died, leaving two sons Bhikharee Lall and Bujrung Sahaye, as his joint heirs according to the Mithila law. The two brothers became heavily indebted and sold their interest in the property (the subject of the first appeal) and applied most of the money in discharge of their debts, including Government revenue. Part of the disputed property which is the subject of the second appeal, was sold in execution of a decree against the two brothers. Their sons, however, sued to set aside both the sales, on the ground, that the debts for which the disputed properties were sold were

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* *Vide* Law Reports, Indian Appeals pp. 321 to 334 ; 14, B. L. R., p. 187.

incurred by their fathers through extravagance and immorality, and to provide funds for the like purposes and to defraud them of their rights in the properties as sons.

Sir Barnes Peacock (In delivering the judgment of their Lordships in the first appeal observed as follows) :—

The property is situated in the Mithila district, and is governed by the Mithila Law, which is very similar to the law administered under the Mitakshara. With reference to the Mitakshara upon this point, it may be well to read from the 11th Moore's Privy Council Cases, p. 89, a portion of the judgment which was delivered by Lord Westbury in the case of Appoveir *vs.* Rama Subba Aiyan, before the Judicial Committee. He says : "According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to a particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court (1,) this suit was brought by Kantoo Lall and Mahabeer Pershad not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father. (2)

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Now it is important to consider what was the interest which Kantoo Lall

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(1) 12 W. R., Full Bench Cases, 5.

(2) 12 W. R., Civil Rulings, 478.

acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died, and had left him as his heir, and the property had come into his hands could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of Hunooman Persand Panday *vs.* Mussamat Babooee Munraj Koonweree* Lord Justice Knight Bruce, who delivered the judgment of the Privy Council, says, "Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, as indeed the case above cited from the sixth volume of the decisions of the Sudder Dewanny Adawlut, North-Western Provinces, incidentally shews. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. * * * * * * Even if there was no necessity to raise the whole purchase-money the sale would not be wholly void.

It appears to their Lordships that the Plaintiffs are not entitled to set aside the deed of sale; * * * *.

The SECOND APPEAL is by Muddun Mohun Thakoor. * * * It appears that Muddun Mohun Thakoor purchased at a sale under an execu-

* 6 Moore's Ind. Ap. Ca., 421; 3 Legal Companion, 197.

tion of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favor of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to, in 6th Moore's Indian Appeal Cases, in purchasing the property, and paying the purchase-money *boná fide* for the purchase of the estate. At page 423 of the report, Lord Justice Knight Bruce says:—"The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *boná fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shewn that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *boná fide* purchased the estate under the execution, and *boná fide* paid a valuable consideration for the property, the Plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the Defandant.

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PRIVY COUNCIL.

The 1st February 1879.

Present:

(*Sir J. Colvile, Sir B. Peacock, Sir M. Smith, and Sir R. Collier.*)

Suraj Bunsi Koer,* as Guardian of her Minor Sons (*Plaintiff*)

versus

Sheo Persad Singh and others (*Defendants.*)

Mitakshara Law—Ancestral Property—Son's Share—Rights of Coparceners—Alienations—Liability of Sons for Father's Debts—Execution-Purchaser—Notice.

Under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate, and can compel his father to make partition of such estate.

The rights of the coparceners in a joint Hindu family consisting of a father and his sons do not differ from those of the coparceners in a like family consisting of undivided brethren, except in so far as the sons are affected by the obligation of the Hindu law to pay their father's debts, and by the fact that he is naturally the manager of the joint family estate.

It is a settled law in the Madras Presidency, that one coparcener may dispose of ancestral undivided estate to the extent of his own share, even by private conveyance, whether for value or by gift.

In the Bombay Presidency, unauthorized alienations voluntarily made by one coparcener, are good, even for his own share, only when made for value.

In Bengal, the law which prevails in the other Presidencies as to alienation by private deed has not yet been adopted, but it is now settled, that the purchaser of undivided property, sold in execution of a decree during the life of the debtor for his separate debt, acquires the debtor's interest in such property, with the power of ascertaining and realizing it by partition.

Under the Hindu law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father. Accordingly, where ancestral property has passed out of the family, either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice to that effect; and a purchaser at an execution-sale, being a stranger to the suit without such notice, is not bound to make enquiry beyond what appears on the surface of the proceedings.

In a suit by the members of an undivided Hindu family governed by the law of the Mitakshara, to set aside a sale of joint ancestral property which had been sold in execution

* *Vide* I. L. R., 5 Calc. 148.

of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be made liable, it appeared that, prior to the sale, the plaintiffs had preferred a claim of objection thereto on the same grounds, and that the Court of execution had declined to adjudicate the claim, and had directed the sale to proceed, referring the claimants to a regular suit. *Held*, that the purchasers at the execution-sale must be taken to have had notice, actual or constructive, of the objections made to the sale by the plaintiffs, and of the order passed thereon by the Court, and to have purchased with knowledge of the plaintiffs' claim, and subject to the result of their suit. *Held* also, that the property having been attached for the debt of a co-sharer during his life-time, the sale was good for his share, but, that as it appeared on the evidence in the suit that the debt was one for which, according to Hindu law, the other co-sharers could not be made liable, the sale was not good for their shares.

This appeal was preferred from a decision of the Calcutta High Court, dated the 21st July 1875, which reversed a judgment of the Subordinate Judge of Tirhoot, dated the 27th April 1874, and dismissed the plaintiff's suit with costs.

The suit in which these decisions were passed was brought by the appellant Suraj Bunsi Koer, widow of Adit Sahai, on behalf of her minor sons, to set aside a sale in execution of a decree obtained by one Bolaki Chowdhry upon a mortgage executed in his favour by the said Adit Sahai, of certain immoveable ancestral property belonging to a joint family governed by the Mitakshara law, in which the minors were co-sharers with their father. The respondents, defendants in the Court of first instance, were the purchasers of the said property at the execution-sale, and the questions raised in the case were, as to whether any, and if any what, rights passed to them under that sale.

Sir J. Colvile (in delivering the judgment of their Lordships said) :—The arguments addressed to their Lordships make it desirable to consider, somewhat in detail, what are the principles of the Hindu law which are the foundation of the plaintiff's claim, and what the rights which flow from them. These questions are of course determinable by the texts of the Mitakshara, as interpreted by judicial decisions either of the Courts of India or of this Board ; and it cannot be said that the course of decision has been altogether uniform and consistent.

That, under the law of the Mitakshara, each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the Mitakshara are to be found

in the 27th and following slokas of the first section of the first chapter. It was argued at the bar that, because in the third sloka of the above section it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and that, "that is an inheritance not liable to obstruction," their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary which are to be found in the Mitakshara itself (*see* slokas 5, 7, 8, 11 of the 5th section of the first chapter.) But it seems to be now settled law in the Courts of the three Presidencies that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Singh* v. *Rajcoomar Singh* (1) and *Raja Ram Tewary* v. *Luchmun Persad* (2), decided by the High Court of Calcutta; that of *Kaliparshad* v. *Ram Charan* (3,) decided by the High Court of the North-Western Provinces; that of *Nagalinga Mudali* v. *Subbiramaniya Mudali* (4), decided by the High Court of Madras; and the case of *Moro Vishvanath* v. *Ganesh Vithal* (5), decided by the High Court of Bombay. The decisions do not seem to go beyond *ancestral* immoveable property.

Hence, the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate.

The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it.

All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the

(1) 12 B. L. R., 373 ; 2 Legal Companion, 6.
(2) B. L. R., Sup. Vol., 731 ; S. C, 8 W. R, 15.
(3) I. L. R., 1 All., 159.
(4) 1 Mad. H. C. R., 77.
(5) 10 Bom. H. C R., 444.

coparceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required; but this is a question which does not arise in the present case.

To what extent an unauthorized alienation can be impeached by coparceners is a more important question, and one upon which there has been a greater conflict of authorities. Nor can it be said that the same law even yet prevails in all parts of India upon it.

A distinction has been often made, both by Courts of Justice and by text-writers, between alienations by private contract and conveyance, and alienations under legal process, as in the case of joint family property seized and sold in execution of a decree against one member of the family for his separate debt.

Since the decision, however, of the cases of *Virasvami Gramini* v. *Ayyasvami Gramini* (1), *Peddamuthulaly* v. *N. Timma Reddy* (2), *Palanivelappa Kaundan* v. *Mannaru Naikan* (3), *and J. Rayacharlu* v. *J. V. Venkataramaniah* (4), it has been settled law in the Presidency of Madras that one coparcener may dispose of ancestral undivided estate, even by private contract and conveyance, to the extent of his own share, and *à fortiori* that such share may be seized and sold in execution for his separate debt.

That the same law now obtains in the Presidency of Bombay, is shown by the cases of *Damodar Vithal Khare* v. *Damodar Hari Soman* (5), *Pandurang Anandrav* v. *Bhaskar Shadashiv* (6), and *Udaram Sitaram* v. *Ranu Panduji* (7). But it appears from the case of *Vrandavandas Ramdas* v. *Yamunabai* (8), and the cases there cited, that, in order to support the alienation by one coparcener of his share in undivided property, the alienation must be for value. The Madras Courts, on the other hand, seem to have gone so far as to recognize an alienation by gift. There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay

(1) 1 Mad. H. C. R., 471.
(2) 2 Mad. H. C. R., 270.
(3) *Ibid*, 416.
(4) 4 Mad. H. C. R., 60.
(5) 1 Bom. H. C. R., 182.
(6) 11 Bom. H. C. R., 72.
(7) *Ibid*, 76.
(8) 12 Bom. H. C. R., 229.

has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. See 1 Strange Hindu Law, 1st edition, p. 179, and App., Vol. II., pp. 277 and 282.

In Bengal, however, the law which prevails in the other Presidencies as regards alienation by private deed has not yet been adopted. In a leading case on the subject, that of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that, according to the Mitakshara law as received in the Presidency of Fort William, one coparcener had not authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family. In another part of the same case the Chief Justice intimated a doubt upon a question which did not then call for decision, *viz.*, whether, under a decree against one coparcener in his life-time, his share of joint property might be seized and sold in execution. That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deen Dyal Lal* v. *Jugdeep Narain Singh* (2), by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution-sale *during the life of the debtor* for his separate debt, does acquire his share in such property with the power of ascertaining and realizing it by a partition.

But then the question arises, what is the consequence of the debtor dying before the execution is complete; whether in that event the coparceners take his undivided share by survivorship, so as to defeat the remedy which the creditor would otherwise have against it.

This was much considered in the case of *Udaram Sitaram* (3) already cited. There the debt was the separate debt of a son joint in estate with his father. The suit was brought, after the death of the son, against the father. A decree was obtained against the father and the son's widow, and it was sought, in a supplemental suit, to enforce that decree against the son's undivided share in joint property, treating that share as liable, in the father's hands, for the son's debt. It was

(1) 3 B. L. R., F. B., 31.
(2) I. L. R., 3 Calc., 198 ; S. C., L. R., 4 Ind. Ap., 24 ; 6 Legal Companion, 31.
(3) 11 Bom. H. C. R., 76.

ruled that this could not be done; that, though a son might be liable to pay his father's separate debts, there was no corresponding obligation on a father to pay his son's debts; that the right of a son to a share in the joint ancestral property had died with him; and that his share, having survived to the father, was no longer a subject upon which the execution could operate. This case is the more important, because the Court, whilst coming to the above decision, fully recognized the alienability of the share of one coparcener as established at Bombay; and showed, with some detail, how the remedy against such a share is to be worked out by the holder of a decree in the debtor's life-time.

Mr. Mayne, in his valuable Treatise on Hindu Law and Usage, section 288, states, that there had recently been a decision to the same effect as that just stated at Madras. Indeed, this was stronger than that at Bombay, because the debtor had died after decree, though before execution. The case is cited as that of *Kooppookonan* v. *Chinnayen* (1), but their Lordships have been unable to obtain access to a copy of those Reports, and can refer only to the abstract of the case in Mr. Mayne's work. The Chief Justice in that case seems to have taken a distinction between a specific charge on the land and a mere personal decree. The existence of such a distinction would be the logical consequence of the power of a coparcener, as recognized at Madras and Bombay, to sell or mortgage joint property to the extent of his undivided share.

In his judgment in the Bombay case of *Udaram Sitaram* v. *Ranu Panduji* (2,) Westropp, C. J., cites a decision of the High Court of the North-Western Provinces, *Goor Pershad* v. *Sheodeen* (3,) which is still stronger than the last-mentioned case at Madras, because there the property had been actually attached in the debtor's life-time.

It may be further observed that the Chief Justice, in the case of *Sadabart Prasad Sahu* v. *Foolbash Koer* (4) already cited, seems to have intimated an opinion in favour of the general rule that an undivided share in joint property cannot be followed in the hands of coparceners to whom it passed by right of survivorship. It was not, however, necessary to decide the point in that case.

Their Lordships have hitherto dealt with the powers and rights of ordinary coparceners. They have now to consider how far those rights and powers are qualified by the obligation which the Hindu law lays

(1) 1 Mad. Reporter, 63.
(2) 11 Bom. H. C. R., 85.
(3) 4 N. W. P. Rep., 137.
(4) 3 B. L. R, F. B, 31, at p. 36 *et seq*.

upon a son of paying his father's debts. The obligation is thus succinctly stated by Chief Justice Westropp in the case of *Udaram Sitaram* (1) :—

"Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes,) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

And as authorities for this proposition he cites Colebrooke's Digest, Bk. I., Chap. V. para. 167, and *Girdharee Lall* v. *Kantoo Lall* (2.) One of the earlier authorities cited at the bar upon this point was the case of *Mussamut Junuk Kishore Koonwar* v. *Rughoonundun Singh*, decided by the late Sudder Court of Lower Bengal in 1861, which is reported at p. 213 of the Decisions of the Sudder Dewanny Adawlut of Bengal for that year. In it an infant son sued by his guardian, in the life-time of his father, to set aside various conveyances which had been made by the father of portions of the joint family estate, and to recover the property sold under them, and also to recover other portions of the estate which had been sold under orders of the Court in execution of decrees. The family was governed by the Mithila law, and the first point decided was, that the restrictions on a father's power of alienation over ancestral immoveable estate under that law were the same as those imposed by the law of the Mitakshara.

This case recognized the distinction between alienations by conveyance and those made under process of execution. The Court set aside the sales by conveyance, because no justifying necessity for them had been established, and it did this although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of Court, on the ground that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove, as against the purchasers under the decrees, that they were so contracted. The words of the judgment on this point are: "freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the plaintiff has been unable to show that the expenses for which these

(1) 11 Bom. H. C. R., 83. (2) L. R., 1 Ind. Ap., 321.

decrees were passed were, looking to the decrees themselves, and we cannot now look beyond them, immoral, and such as, under Hindu law, the son would not be liable for."

The decision of this tribunal in the before-mentioned case of *Muddun Thakoor* v. *Kantoo Lall* (1) has, however, gone beyond this decision of the Sudder Dewanny Adawlut, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court. The judgment moreover, and this is the portion of it that is chiefly material to the determination of the present appeal, affirms the principle laid down in the judgment of the Sudder Dewanny Adawlut, that a purchaser under an execution is not bound to go further back than to see that there was a decree against the father; and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *boná fide* purchased the estate under the execution, and *boná fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property.

This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions:—

1*st*.—That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, 2*ndly*, that the purchasers at an execution-sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.

Their Lordships have now to apply the principles to be extracted from the authorities which have been considered, to the case before them.

It has been found by both the Indian Courts, and in their Lord-

(1) 14 B. L. R., 187; S. C., L. R., 1 Ind. Ap., 333; 8 Legal Companion, 155.

ships' opinion properly found, that the plaintiffs, as between them and Bolaki Chowdhry, the judgment-creditor of Adit Sahai, had established that neither they, nor the ancestral immoveable estate in their hands, were liable for the debt to Bolaki which had been contracted by their father. The two material issues on this point were: 1st, whether the bond to Bolaki, executed by the late father of the minors, was legally valid so far as the minors' interest is concerned, and whether the money thus borrowed was devoted to the satisfaction of debts incurred when the minors had no existence; and, 2ndly, what sort of a life did Adit Sahai live; did he spend the money borrowed from Bolaki Chowdhry in immoral purposes? The Subordinate Judge, upon a full consideration of the evidence, found both these issues in favor of the plaintiffs, and decreed to them the relief sought by their plaint. The judgment of the High Court does not impeach this finding as regards Bolaki Chowdhry. On the contrary, the words of the learned Judge who wrote the judgment of the Court are: "And this decision would, I think, have been perfectly fair and right were we dealing with Bolaki Chowdhry only." There is no doubt a subsequent passage to the effect that the onus was clearly on the plaintiffs of showing against the respondents, who purchased at the execution, that the decree against Adit Sahai was an improper one, and that the evidence was insufficient to prove the fact.

If in this last passage of the judgment the Court meant to rule that the evidence which was sufficient to prove the two issues above-mentioned and the matters of fact involved in them against Bolaki Chowdhry, was insufficient to prove them against the respondents, that ruling would, in their Lordships' opinion, be erroneous. The respondents were parties to the suit, they went to trial upon those issues, and had equally with Bolaki Chowdhry the means of cross-examining the plaintiffs' witnesses, and of adducing counter-evidence. This observation, however, leaves untouched the principal ground upon which the High Court dismissed the plaintiffs' suit as against the respondents, *viz.*, that upon the authority of the decision of this Board in *Muddun Thakoor* v. *Kantoo Lall* (1), the respondents are to be treated on the footing of purchasers for value without notice; for it is one thing to prove a fact, and another to prove that a particular party had notice of that fact. Their Lordships desire to say nothing that can be taken to

(1) 14, B. L. R., 187; S. C., L. R, 1 Ind. Ap., 333; 8 Legal Companion, 155.

affect the authority of *Muddun Thakoor's* case (1), or of the cases which may have since been decided in India in conformity with it. The material passage of the judgment in *Muddun Thakoor's* case (1) is in these words :—

"A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, was liable for the payment of the fathers' debts. The purchaser under the execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the fathers; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and he having inquired into that, and *boná fide* purchased the estate under the execution, and *boná fide* paid a valuable consideration for it, the plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant."

It appears to their Lordships that the present case is clearly distinguishable from that of *Muddun Thakoor* (1,) and does not fall within the principle laid down in the passage just cited. It has been seen that, before the respondents purchased, the claim of the plaintiffs was preferred in the Court wherein the execution-proceedings were pending in the form of objections to the sale. The Court refused to adjudicate upon the claim in an execution-proceeding, and accordingly allowed the sale to take place, but made an order referring the plaintiffs to a regular suit for the establishment of their rights. Their Lordships think that the respondents must be taken to have had notice, actual or constructive, of the plaintiffs' objections, and of the order made upon them, and therefore to have purchased with knowledge of the plaintiffs' claim, and subject to the result of this suit. It follows that, as against them as well as against Bolaki Chowdhry, the plaintiffs have established that, by reason of the nature of the debt, neither they, nor their interests in the joint ancestral estate, are liable to satisfy their father's debt.

The question remains, whether they are entitled to any and what relief as regards the father's share in this suit? It seems to be clear

(1) 14 B. L. R., 187 ; S. C., L. R., 1 Ind. Ap., 333 ; 8 Legal Companion, 155.

upon the authorities that if the debt had been a mere bond-debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's life-time, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his life-time, as a security for the debt, might operate after his death as a valid charge upon Mouza Bissumbhurpore to the extent of his own then share. The difficulty is that, so far as the decisions have yet gone, the law as understood in Bengal does not recognize the validity of such an alienation.

Their Lordships are of opinion that it is not necessary in this case to determine that vexed question, which their former decisions have hitherto left open. They think that, at the time of Adit Sahai's death, the execution-proceedings under which the Mouza had been attached and ordered to be sold had gone so far as to constitute, in favor of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-Western Provinces, in the case of *Goor Pershad* v. *Sheodeen* (1) already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognised the seizable character of an undivided share in joint property which has since been established by the before-mentioned decision of this tribunal in the case of *Deen Dyal Lal* (2.) If this be so, the effect of the execution-sale was to transfer to the respondents the undivided share in eight annas of Mouza Bissumbhurpore, which had formerly belonged to Adit Sahai in his life-time; and their Lordships are of opinion that, notwithstanding his death, the respondents are entitled to work out the rights which they have thus acquired by means of a partition.

They will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court, and also that of the Subordinate Judge, which is clearly wrong in so far as it absolutely set aside the bond, the decree, and the execution-sale, and in lieu thereof to make an order declaring that, by virtue of the execution-sale to them,

(1) 4 N. W. P. Rep, 137.

(2) I. L. R., 3 Calc., 198 ; S. C, L. R., 4 Ind. Ap., 321 ; 6 Legal Companion, 31.

the respondents acquried only the one undivided third share in the eight-anna share of Mouza Bissumbhurpore, in the pleadinge mentioned, which formerly belonged to Adit Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possess in his life-time; and ordering that the appellants be confirmed in the possession of the said eight-anna share of Mouza Bissumbhurpore, subject to such proceedings as the respondents may take in order to enforce their rights above declared. The order should further direct that the costs in the Courts below be apportioned according to the usual practice of those Courts, when the party plaintiff is only partially successful. But the appellants, having succeeded here on a material portion of their claim, are entitled to the costs of this appeal.

PRIVY COUNCIL.

THE 20TH & 21ST MARCH, 1879.

Present:

(Sir J. W. Colvile, Sir M. E. Smith, and Sir R. P. Collier.)

STUART SKINNER * *alias* NAWAB MIRZA *(Plaintiff,)*

versus

WILLIAM ORDE and others *(Defendants.)*

Pauper petition—Payment of Court-fees by petitioner—Date of Institution of suit—Limitation.

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII. of 1859, for leave to sue as a pauper, but subsequently, pending an enquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time.

The question of law raised by the case was as to whether the claim of the appellant, who had originally applied for leave to sue *in formâ pauperis,* but had afterwards paid the institution fees, was barred by limitation. The High Court affirmed the decision of the Subordinate Judge, holding the date of the payment of fees to be the date of the institution of the suit, and consequently the claim of the plaintiff as barred by the Statute of Limitations.

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* *Vide* I. L. R., 2 All. 241.

Sir Montague E. Smith (in delivering the judgment of their Lordships said) :—The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue *in formâ pauperis* contains all that a plaint is required to do. By s. 300 "the petition shall contain the particulars required by section 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints." Therefore it contains in itself all the particulars the statute requires in a plaint, and, *plus* these, a prayer that the plaintiff may be allowed to sue *in formâ pauperis*.

The Act provides what shall happen if the prayer of the petition be granted by s. 308.* It also provides by s. 310† what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that, unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there, then, anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled to commence *de novo?* Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical, the Court should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July, 1873,

* Corresponding to s. 410, Act X. of 1877.

† S. 413, Act X. of 1877.

and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by s. 308 than that contemplated by s. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different.

Their Lordships have only to advert to the Statute of Limitations, Act IX. of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in section 4* is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The respondents must pay the costs of the appeal.

* Corresponding to s. 4, Act XV. of 1877.

PRIVY COUNCIL.

THE 15th JULY, 1879.

Present :

(*Sir Barnes Peocock, Sir Montague E. Smith, and Sir Robert P. Collier.*)

BISSESSUR LALL SAHOO, (*Appellant*)

versus

LUCHMESSUR SINGH, (*Respondent.*)

Joint family—Property acquired by a member—Debts—Assumption.

Where a family is proved to be joint, it is to be assumed, as laid down in the case of *Gossain vs. Gossain*, 6 Moore's Indian Appeals, that property purchased by a member of the family is not on his own account, but for the joint family, and that debts due on account of it must be deemed to be debts due from the joint family.

The points to be decided in this case arise in this way :—One Nath Dass died in the year 1853 leaving a son, Ram Nath Dass, who died in the year 1855; and Ram Nath Dass left two sons, Mosaheb and Chooman. The Rajah of Ramnugger, as he has been called in the argument, that is to say, the guardian of the infant Rajah of Ramnugger, brought three suits in the year 1862 in respect of rent due from members of the family of Mosaheb and Chooman. In the first suit the judgment was given on the 22nd March 1862 and it seems that the plaintiff in that suit sued the widow of Nath Dass, and the widow of Ram Nath Dass as guardians of two young men who are assumed to be Mosaheb and Chooman under other names. The claim was for the recovery of the rent, about Rs. 3,000 odd, which amounted to about Rs. 8,000 with interest and costs, and the statement is that Nath Dass and Ram Nath Dass took a lease of a certain Mouzah Rudapore, and that the rent accrued in respect of that Mouzah. Then it is ordered " that this decree will not be executed against the person and self-acquired property of the judgment-debtors, but it will be executed against the property left by the deceased lease-holders."

Upon this judgment execution was issued against a certain Mouzah Muddunpore, which appears to have been bought in the year 1847 in the name of Ram Nath Dass. Whether it was bought by Ram Nath Dass for himself and separately, or as a member of the joint family, is a question to be hereafter discussed.

There were two other judgments, the nature of which will be subsequently referred to, dated respectively the 9th April 1862, and the 16th

April 1862, whereby large sums were decreed beyond the Rs. 8,000 which was obtained by the first decree; and an order was obtained by the plaintiff empowering him to put up Mouzah Muddunpore for sale in satisfaction of all three decrees. This was done, and it was bought in by the plaintiff at, in round numbers, Rs. 35,000. Mosaheb and Chooman made no objections to this proceeding at the time, or indeed at all; but some three years afterwards they sold to the plaintiff in this suit their right to recover the difference between the Rs. 8,000, the sum obtained by the first decree, and the whole Rs. 35,000 for which Muddunpore was sold; that is to say, they claimed to recover the sum which Mouzah Muddunpore was charged with in execution of the last two decrees; and whatever rights they had the plaintiff has neither more or less.

It is necessary in the first place to advert to what was the main contention in the case. It was contended on the part of plaintiff that the family of Nath and Ram Nath became separate about the year 1839. It was alleged that at the time there was a quarrel between Ram Nath Dass and his father, and that they ceased to be joint in food. But on the part of the plaintiff there was scarcely any evidence of separation of estates; in fact, on his own case, there was some evidence that there was no separation in estate, and that Ram Nath Dass acquired no separate property. The first Court held that the separation had been proved, and that Mouzah Muddunpore was bought by Ram Nath Dass for himself and with his own property, although it certainly does not appear, according to the evidence to the plaintiff, how he could have obtained the funds for purchasing it. The High Court reversed the decision on this point of the lower Court, and came to the conclusion that the family was joint, and had never separated; and their Lordships agree with the High Court.

This being so, the consequence follows, as has been laid down before in the very well known case of *Gopeekrist Gossain* vs. *Gungapersaud Gossain*, 6 Moore's I. A., 53, that the purchase of Muddunpore by Ram Nath Dass would be assumed to be a purchase, not on his own account, but for the joint family, and that Muddunpore would be joint family property.

It now becomes necessary to examine the two decrees subsequently to that of the 22nd March 1862 with respect to which there is no dispute. The next decree is dated the 9th April 1862, and in that suit Mosaheb Dass is sued as the heir of Nath Dass, and the decree is for

the recovery of Rs. 39,000 on account of the rents of a certain Mouzah Ramnugger, and it is stated that Nath Dass had taken a lease of that, from 1847 to 1854. Then it is further ordered that this decree is not to be executed against the person and self-acquired property of the defendant, but against the property left by the deceased leaseholder, Baboo Nath Dass only.

It appears to their Lordships that, acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosaheb Dass is sued as a representative of the family, and that it must further be assumed that Nath Dass, in taking the lease of the mouzah, here referred to as Ramnugger, in respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. With respect to the order as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is, that the decree is not to be executed against the self-acquired property of Mosaheb, but against the family property which is there described as that left by Nath Dass for the purpose of distinguishing it from the separate property which may have belonged to Mosaheb. The only difficulty with reference to the second and third decrees arises from a certain informality with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property.

The same reasoning applies to the third decree, although curiously enough the action seems to have been brought against the widow as the guardian of Mosaheb. Here there is the same direction with reference to the property, but substantially the same observations apply which have been applied to the former decrees.

Their Lordships have, therefore, come to the conclusion that, although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property. Their Lordships have, therefore, come to the conclusion that the High Court has been right in dismissing the appeal from the lower Court.

This being their Lordships' view of the case, they do not think it

necessary to go into the question, which was touched upon, but not decided, by the High Court, whether the plaintiffs, or either of them, were bound to dispute the sale of Mouzah Muddunpore in the execution proceeding, and were debarred from bringing this suit.

Two cases have been referred to—one of *Ishan Chunder Mitter* vs. *Buksh Ali Soudagur*, I. Marshall's Reports, 614, and another in 14 Moore's I. A., 605—*The General Manager of the Raj Durbhunga* vs. *Maharajah Coomar Ramaput Singh*, the effect of which may be stated thus: that in execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical ground when they find that it is substantially right.

Under these circumstances their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

PRIVY COUNCIL.

THE 6TH FEBRUARY, 1880.

Present :

(*Sir James Colvile, Sir Montague E. Smith and Sir Robert P. Collier.*)

RAJ BAHADUR SINGH (*Appellant*)

versus

ACHUMBIT LALL (*Respondent.*)

Possessory Suit—Setting aside a document—Limitation—Act IX. of 1871, Sched. II., Art. 129—*Adoption.*

The provision in Act IX. of 1871, Sched. II, whereby it is enacted that, with respect to suits to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father," does not interfere with the right, which but for it a plaintiff has, of bringing a suit to recover possession of real property within twelve years from the time when the right accrued.

Their Lordships in delivering their judgment said :—It only remains to notice two subsidiary questions: The widow executed, on the 7th July 1851, a putnee lease in favour of Raj Bahadoor Singh, of two out of three of the mouzahs which are the subjects of this suit, and part of the prayer of the claim is, that that putnee lease be set aside. Inasmuch as it has been found as a fact by both Courts that there was no necessity for borrowing the sum for which the putnee

was granted, it follows that if the widow had no more than a Hindu widow's estate the putnee could only bind her life interest. It appears that the lady also executed what has been called a deed of adoption on the 24th May 1860, by which she professed to adopt, in pursuance of the permission of her husband, who had died in 1825, the father of Raj Bahadoor, to whom the putnee had been granted, and Chutturdhari Lal, the brother of the plaintiff and a defendant, and to make over to them her property. But the gift was not to take effect until her death, possession being retained by her during her life-time. It has been admitted on the part of the appellants that this document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. A part of the claim is, that this document also be cancelled. Upon this part of the case a question has been raised concerning the statute of limitations, and the schedule to the last statute of limitations of 1871 has been quoted, wherein it is enacted that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is " the date of the adoption or (at the opinion of the plaintiff) the date of the death of the adoptive father." On the above view of the document, the words of the statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff had of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as according to the admitted construction of the document the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the plaintiff whether it be set aside or not. Their Lordships, however, think it well to say that the decree of the Court below in setting aside this document and the putnee lease must be considered to have in effect decided no more than that the plaintiff was entitled to recover notwithstanding those documents, without in any degree compromising any rights which other parties may have under them.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

CALCUTTA HIGH COURT.

THE 2ND JUNE, 1879.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

SUNKUR PERSHAD* (*Defendant,*)

versus

GOURY PERSHAD (*Plaintiff.*)

Limitation Act (IX. of 1871), sched. ii., art. 59—Money paid at Defendant's request—Hindu Family—Debts of Manager.

In the year 1867 the plaintiff, who was then living jointly with the defendant who was his brother, executed a bond to secure the repayment of monies advanced to him, which monies were applied by him for the joint benefit of himself and the defendant. In the year 1868 the plaintiff executed another bond for the same purpose. In 1870 the plaintiff and defendant separated, and the lender, thereupon, sued the plaintiff upon the bond executed in 1867, and obtained a decree. In 1874, the plaintiff executed a fresh bond in favor of the decree-holder, in order to avoid execution of the decree and to retire the bond of 1868. In 1877 (within three years from the date of the fresh bond,) the plaintiff sued his brother to recover a moiety of the sum secured thereby,—*held*, that the date upon which money was paid by the plaintiff for the defendant must have been before 1870, and that, therefore, the suit was barred by limitation under Act IX. of 1871, sched. ii., art. 59.

Ramkristo Roy v. *Muddun Gopal Roy* (12 W. R, 194)) followed.

The condition of a Hindu family is *primâ facie* joint, and, therefore, property held by the managing member of a Hindu family is *primâ facie* joint; but as there is nothing to prevent the individual managing member from contracting debts on his own account, there is no presumption that a debt contracted by him is joint.

This was a suit to recover Rs. 3,065, being a moiety of an amount covered by a bond executed by the plaintiff to meet certain bond-debts contracted by himself and his brother, the defendant, during the time they lived together jointly.

The plaintiff stated that the defendant was his brother, and that they had lived together jointly till the year 1870. That, whilst so living jointly, they had received certain sums of money from one Gujraj Jha, which sums of money were made applicable to the payment of their joint debts. These sums were secured by two bonds, dated the 30th March 1867 and the 8th December 1868, executed by the plaintiff alone. In September 1870, the separation took place, whereupon Gujraj Jha brought a suit on the first bond against the present plaintiff and obtained a decree; the plaintiff then, in order to prevent a suit being brought against him on the second bond, executed a fresh bond in favour of Gujraj Jha on the 16th March 1874, covering the amounts before

* *Vide* I. L. R, 5 Calc. 321.

secured, and then, on the 16th March 1877, brought this present suit against his brother to recover a moiety of the sum secured by the last bond, together with interest and costs.

The defendant pleaded limitation; and that he had paid his share of the debt secured by the bond of the 8th December 1868, as would appear on the back of the bond when produced. And that, at the time of the separation, certain debts were charged to each of the brothers, the plaintiff undertaking to pay the debt due under the bond of the 30th March 1867. That the bond of the 16th March 1874, was executed after the separation, and that, therefore, he was not liable under it; moreover, no cash payments having been made by the plaintiff in discharge of the first bond, he was not entitled to sue for contribution until he himself had paid the debt.

The Subordinate Judge found that the suit was not barred; and that, as the plaintiff had not produced the bond of the 8th December 1868 to disprove the statement of the defendant as to payment, he was not entitled to recover the money secured by that bond; but that the defendant had failed to prove his allegation of separation and distribution of debts, and, therefore, the debt must be presumed to be joint; that the fact that the bond was executed after the alleged separation could be no defence to the suit, it being necessary to look into the character of the original debt, he, therefore, held that the plaintiff was entitled to recover a moiety of the amount claimed *minus* the amount secured by the bond of the 8th December 1868, but disallowed the claim for interest.

BROUGHTON, J. (AINSLIE, J., concurring.) * * * The case for the plaintiff is as follows:—He says, that when he and his brother were joint, that is to say, before September 1870, when they separated, he borrowed the money on bonds from a money-lender, and spent it for the joint benefit of himself and his brother; these bonds were signed by the plaintiff alone, and the money-lender sued him, and got a decree upon one of them. In order to avoid execution of this decree, and to retire another bond upon which no suit had been brought, the plaintiff came to an arrangement with the money-lender, and executed, on the 16th March 1874, a fresh bond to cover both debts. It is for the half of the debt on this last bond with costs and interest, including future interest to accrue upon it, that the suit has been brought.

The Court of Original Jurisdiction disallowed the future interest, and the amount of that one of the original bonds upon which no decree had been obtained, finding that the bond had been paid off by the de-

fendant himself, and the Subordinate Judge gave the plaintiff a decree for Rs. 1,788-0-8, with interest, from the filing of the plaint to realization, at 6 per cent., and costs proportionate to his success in the suit.

The Court held, that the plea of limitation taken by the defendant could not be maintained, as the cause of action arose on the 18th of March 1874 when the last bond was executed, and the suit was instituted on the 16th of March 1877, within three years. The defendant had pleaded that, at the time of the separation between the two brothers, the plaintiff took upon himself the liability to pay certain debts, and that this debt was one of them; but the Court held that he had not proved this, and in the absence of proof, the Court presumed that each brother must be held to have taken upon him the liability to pay half of the debts. It was held, that the debts for the payment of which the money was originally borrowed were presumably joint debts, no proof to the contrary having been offered. It was also held, that the fact that the bond was executed after the separation was no defence to the suit, but that the character of the original debt must be looked to, and as it had been already decided to be a joint debt, the plaintiff was entitled to recover a moiety from the defendant, and that he was so entitled notwithstanding the fact that he had not paid the debt upon the bond of 1874.

Both parties appealed from this decision to the Judge of Tirhoot, who dismissed both appeals.

The defendant now appeals from the decree in appeal, and contends that the question, whether the suit was barred by the law of limitation was improperly decided against him, and that the onus was upon the plaintiff to show that the debts, to pay which the original loan was contracted, were joint debts.

It appears to us that both these points ought to have been decided in favour of the defendant. The rule of limitation, which has been held, and, I think, rightly held by the Judge of the first instance, to govern the case is Act IX. of 1871, sched. ii., art. 59, which provides—that a suit for money payable to the plaintiff, for money paid for the defendant, must be instituted within three years from the time when the money was paid. If the money was paid for the defendant at all in this case, it was paid before the year 1870, when the brothers separated, and it is from that date, and not from the date of the bond subsequently given in 1874, that the period of limitation ought to count. Were it otherwise, it would be competent to a plaintiff in such a case to defer the

operation of the Act of Limitation indefinitely by making a fresh arrangement with the lender of the money, to which arrangement the defendant is no party, and of which he has no notice. This view of the law accords with the decision of this Court in the case of *Ramkristo Roy* v. *Muddun Gopal Roy* (1.)

With regard to the other point, although property in the hands of the managing members of a joint Hindu family may in most cases be presumed to be the property of the family and not of the individual manager, it does not follow that a debt contracted by the manager in his own name is presumably contracted on behalf of the family. The condition of a Hindu family is *primâ facie* joint, and consequently the property is *primâ facie* joint in the hands of whoever among the members of the family happens to manage and possess it, but there is nothing to prevent the individual manager contracting a debt upon his own account.

The decision of the Court below is reversed, and the suit dismissed with all costs.

CALCUTTA HIGH COURT.

THE 24TH JUNE, 1879.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

ASHROF ALI* and another (*Prisoners*),

versus

THE EMPRESS (*Respondent*).

False Charge—Penal Code, ss. 211 *and* 109*—Charge laid before Police Officer.*

There is nothing in s. 211 of the Penal Code which limits the penalty there imposed to cases in which attempts have been made to substantiate false charges in a Court of Justice.

A false charge made before the police is therefore punishable under this section.

On the 16th November 1878, one Ashrof Ali preferred a charge at the police station against one Batai, of stealing money from a box which belonged to him, but which had been placed in a room occupied by one Gulzar Khan. Gulzar Khan accompanied Ashrof Ali to the police station, and the charge was made on the authority of what Gulzar told Ashrof. The case was enquired into and reported to the Joint Magistrate, who on the report found that the charge was false, and ordered

(1) 12 W. R., 194.

* I. L. R., 5 Calc. 281.

that Ashrof and Gulzar should be committed for concocting a false charge. This was done, and Ashrof and Gulzar were charged, the former under s. 211 of the Penal Code, and the latter with abetment of the same offence; and the result was that the Sessions Judge convicted Ashrof under s. 211 of the Penal Code, and Gulzar, under s. 109 of the Penal Code, for the abetment of an offence under s. 211, and sentenced them to three years' rigorous imprisonment.

The prisoners appealed to the High Court. Mr. *R. E. Twidale* for the appellants, contended, that the conviction and sentence were bad, inasmuch as the original complaint made by Ashrof and Gulzar had not been tried, nor had any order of dismissal been recorded; and that in any case the sentence passed was too severe.

The judgment of the Court was delivered by

MITTER, J. (Tottenham, J., concurring).—On behalf of the appellants a question of law has been raised before us. It has been contended that the whole proceedings in this case are illegal, because the appellants were allowed no opportunity to substantiate their charge in any Criminal Court. In support of this contention several decisions of this Court have been cited before us. These cases seem to us to be distinguishable. In all these cases proceedings were commenced by the accused person in a Court. It has been held in these cases that no sanction should have been given for a prosecution against him under s. 211 of the Indian Penal Code without giving him the full opportunity of substantiating his charge. In this case no formal complaint was made by the appellants before any Criminal Court. The charge of theft was made to a Police officer, who reported it to be false. The appellants did not renew this charge before any Criminal Court. We do not think that there is any force in the contention raised before us, and that the decisions relied upon do not lend any support to it.

Nor is there any thing in s. 211 of the Code limiting the penalty to cases in which attempts have been made to substantiate false charges in Courts of Justice. A false charge laid before the police and never intended to be prosecuted in Court, may obviously subject the accused party to very substantial injury, as defined in s. 44 of the Penal Code. We therefore affirm the conviction of both the prisoners; but, considering that the sentence of three years' rigorous imprisonment is, under the circumstances, unnecessarily severe, we reduce the term to eighteen months in the case of each of the appellants.

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ERRATA.

In page 150, line 23, for "Summary of triat" read "Summary trial."
" " " 25, " "Ofience" " "Offence."

THE LEGAL COMPANION.

August, 1880.

THE Lower Appellate Courts should bear in mind that s. 574 of the Civil Procedure Code requires them to state in their judgments (*a*) the points for determination, (*b*) the decision thereupon, (*c*) the reasons for the decision, &c; and that it is illegal to dismiss appeals by simply writing the following words "There is no reason to interfere with the judgment of the lower Court. The appeal is dismissed with costs," or words to the like effect. The Calcutta High Court, in the case of Mohunt Gopal Dass *vs.* Hurreeram Roy and another (decided on the 27th May last) observed as follows :—

"As the Lower Appellate Court may possibly have been misled by a supposed precedent furnished by some of the judgments of this Court, we would observe that when this Court uses a brief form, it will be found that the decision of this Court is not appealable to any other tribunal and as the parties only are interested in the decision and they have been fully informed of the opinion of the Court and its reasons for that opinion in the course of the argument, the same necessity for writing the judgment *in extenso* does not exist as it unquestionably does in the case of a Court whose decrees and judgments are open to appeal and revision."

But if the Hon'ble Judges of the High Court err in their judgment, it might, in some cases, be quite impossible for the parties to apply for review, unless the reasons are stated as required by the above Section of the Code. Moreover, parties residing in the Muffassal cannot always learn the reasons for the judgment of the High Court unless their agents choose to write to them; and where they apply for certified copies, they cannot but be disappointed. Hence we think it desirable that the procedure in the delivery of judgments on the first and second appeals should be uniform.

We are given to understand that some officers administering civil and criminal justice in the Muffassal do not at all cross-examine witnesses deposing against persons who cannot afford to retain professional men in their assistance and who themselves are quite ignorant of the art of cross-examination. The said officers seem to think that their duty is sufficiently discharged if they merely ask the party against whom a witness may be deposing, whether he has any questions to

ask to the witness by way of cross-examination. The invariable answer to such a requisition from the Court is "what shall I ask." Then the officer makes a note under the deposition, to the effect that the "opposite party does not cross-examine." This sort of procedure is quite against the expectations of the Government which provides highly paid officers to preside in our Courts for the due administration of justice to the rich and the poor alike. Where a party cannot engage a professional man, there it is more incumbent upon the Court to see that no evidence goes against him without being tested by a sifting cross-examination.

We have come to know that some of the Civil Courts allow judgment-creditors to purchase the properties of their judgment-debtors sold in the execution of their decrees, simply upon the receipt of a stamped application for permission to bid. S. 294 of the Civil Procedure Code does not seem to have been intended solely or at all for the increase of stamp revenue. The object of the legislature in providing that section seems to have been to disallow judgment-creditors to bid at sales in execution of their own decrees, so that their interest would be to see that the properties are sold at their highest prices; whereas if they are allowed to bid at such sales, they would naturally try to purchase at the lowest prices. But there might be cases in which it would be injudicious to withhold permission, as for instance, when the number of bidders is small and the properties might sell at larger prices, if the decreeholder is permitted to bid. Hence it is necessary to use discretion, in every case, in giving or withholding permission. The practice of giving indiscriminate permission simply upon the receipt of a stamped application frustrates the object of the legislature.

We understand that s. 28 of the Legal Practitioners' Act is producing greater evil than good. As a rule, in the Moffussal Courts, written agreements for payment of fees are not made, in every case, between legal practitioners and their clients; and it always occurs, in cases of money claims, that suitors verbally promise to pay fees after the decree is passed and the decretal amount realized; but in many instances, we understand, the clients pay a small amount of fees to their pleaders and retain for themselves a larger portion. No doubt retention of any part of the pleader's fees "agreed to be paid," subjects a client to criminal prosecution under the Act; but where is the valid agreement

when it is not reduced to writing and filed in Cont within fifteen days from the date when it is made. Moreover who thinks of prospering in business, after such a prosecution? It is therefore highly necessary for the legislature to reconsider and modify that section.

We beg to acknowledge with thanks the receipt from Mr. D. E. Cranenburgh a copy of his edition of the unrepealed Bengal Acts. It is a very useful publication and very cheap. It contains the Bengal Council Acts from the year 1862 up to such of those of the current year as were passed before its publication. Moreover, it contains an Appendix containing the Regulations framed under 33 Vic., C. 3, relating to the territories subject to the Bengal and Assam Governments, a Chronological Table of the Acts of the Bengal Council and a General Index. The price of the book is Rs. 5 only; and Mr. Cranenburgh offers his Edition of the Bengal Regulations (price Rs. 8 a copy) at their half price to those who would purchase his Bengal Acts. No doubt, the possession of all the unrepealed Bengal Acts and Regulations for the trifling amount of Rs. 9 only is an opportunity which every Bengal legal practitioner will avail of. It is needless on our part to recommend the work to the public, when the very mention of its contents is a sufficient recommendation.

MADRAS HIGH COURT.

THE 15TH JANUARY, 1879.

Before Mr. Justice Innes and Mr. Justice Kernan.

VENKATANARSAMMAH,* *(Defendant,) Appellant,*

versus

RAMIAH, *(Plaintiff.) Respondent.*

Mortgage—Priority.

Held that the plaintiff having bought the rights and interests of the mortgagors under a sale held prior to the sale to the defendant, the mortgagors had no right or interest to sell to defendant; but that as the purchase by plaintiff was subject to the mortgage to the defendant, and as defendant was not a party to plaintiff's mortgage suit, defendant's right as mortgagee was not affected by the sale to the plaintiff, though effect could not be given to that right in the present suit.

KERNAN, J.—In this case the plaintiff seeks to eject the defendant from the possession of immoveable property. The facts are—On the

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* *Vide* Indian Law Reports, 2 Madras Series, p. 108.

15th July 1864 two undivided brothers executed a mortgage for Rupees 500 of the joint property to the plaintiff, and on the 8th January 1868 they executed another mortgage of the same property for Rs. 1,000 to the defendant, who caused the same to be registered under Act XX. of 1866. On the 2nd of August 1871 a suit was brought against the brothers on foot of the mortgage of 1864; and on the 7th October 1871 a decree was made for the sum due, Rupees 872-12-10, and the decree directed that, in default of payment in two months, the mortgaged property should be sold, and if the debt was not discharged by the produce of the sale, the mortgagors should pay the balance personally. In March 1872 the decree-holder, in execution of the decree, set up for sale through the Court Officer, under the ordinary process of attachment, the property mortgaged. At the sale the present plaintiff, the execution creditor, bought the property for Rupees 427, and the sale was duly confirmed and the plaintiff was put into possession of the property, and so remained until he was put out of possession under process issued in the suit next mentioned. In the year 1871 a suit was filed against the two mortgagors on foot of the mortgage of 8th January 1868 by the mortgagee (the now defendant), and a decree was made for payment of the amount due on the mortgage and for a sale of the property in the same terms as in the decree on the mortgage of 1864. Under that decree a sale was had after attachment of the same property, and the defendant, the mortgagee and decree-holder, became the purchaser. The plaintiff in this case, who was the purchaser at the first sale, either put in, in the defendant's suit, a claim before the sale under Section 246, or he tried to obstruct the delivery of possession under Section 268, 269; but he was referred to a regular suit and was dispossessed and the present defendant was put into possession.

This suit was then brought by plaintiff, who was the *first* mortgagee and purchaser, against the second mortgagee and purchaser, and there being a decree of the Lower Appellate Court in favor of the plaintiff, the defendant filed this second appeal. * * * * *

Now it is quite clear that the decree of a Court of Equity giving effect to the mortgage security which it preserves, is entirely different from a judgment which merges the cause of action. If the decree is a substitute for the mortgage, then the mortgage will be no longer existing. This result would lead to the destruction by a decree of Courts of Equity of securities intended to be given effect to. For if the right to the security under the decree only takes the date of the decree, then all

securities given by the mortgagor after the mortgage of 1864 and up to October 1871 (the date of the decree) being prior to the decree, the decree-holder would lose the benefit of his mortgage. The decree in a mortgage suit is made according to the doctrines and practice of equity, which would be utterly inconsistent with merger. It is settled practice, when there is a decree of a Court of Equity for sale, and a sale thereunder, for the mortgagee if he has a legal estate to join in the sale and conveyance; the mere decree gives no title; it is the sale and conveyance which gives title. Again this doctrine only affects the parties to the suit in which the judgment is obtained. If there is a suit on a joint and several bill of exchange against *one* of several debtors and judgment against him, actions may be brought on the same note against the other separate debtors. (*King* v. *Hoare supra*) (1). The defendant in this present case was no party to the original suit on the mortgage of 1864, and is neither bound by it nor entitled to have any advantage from it. In this particular case it is not necessary to determine whether a purchaser under a sale "only" of rights and interest of the defendant in the property (Section 249, Act VIII. of 1859) under a decree in a mortgage suit acquires not only those rights and interest but also the interest of the mortgagee under the mortgage. I may, however, observe that there is no express provision in the late or the present Code providing for the sale or conveyance of the mortgagee's rights to the purchaser. Sections 223 to 231 of the old Code refer to decrees for delivery of possession of immoveable property, and Section 249 relates to sale of rights and interest of the defendant "only". However, as the sale of the interest of such mortgagee must have been intended to be provided for, and as there is only the one process for the sale of immoveable property under the Code, I think that the construction put upon the Code by the Calcutta High Court is a necessary result, viz., that under a sale in execution of a decree for sale in a mortgage suit, the right and interest which the mortgagee and the mortgagor could jointly sell pass to the purchaser (*Syed Emam* v. *Rajcoomar Dass*) (2).

In the High Court on the Original Side it has been our practice to have sales made in execution of mortgage decrees by auction, without the intervention of process of attachment.

The present Code, Section 286, contains provisions to enable the

(1) 13 M. and W. 494 and 504.
(2) 14 Ben. L. R., p. 421.

creditor and the purchaser to know what interest is really to be sold, but still the question in this case is not satisfactorily provided for, and cannot be so until provision is made for the mortgagee joining in the conveyance, or unless effect is expressly given by legislation to the sale by the officer *as if* the mortgagee had joined.

Here, however, both plaintiff and defendant have bought rights and interests of the mortgagors under mortgage decrees. Therefore if the rights of a mortgagee did not pass in the one case, neither did similar rights pass in the other case, and *vice versâ*. The plaintiff bought the rights and interests of the mortgagors under a sale held in March 1872 and got into possession. Such sale and possession were prior to the sale to the defendant. There was therefore no right or interest in the mortgagors left to sell to defendant, and he acquired no title against the plaintiff in point of law. The plaintiff should therefore not have been put out of possession at the instance of the defendant in his suit. But although nothing passed to the defendant by the sale, yet as the purchase by plaintiff of the right and interest of the mortgagor was subject to the mortgage to the defendant, and as the defendant was not a party to plaintiff's mortgage suit, the right of the defendant as mortgagee is not affected by the sale to the plaintiff. We cannot give effect to that mortgage in this suit, and must leave the defendant to assert his rights on foot of it as he may be advised. This second appeal must be dismissed with costs.

INNES, J.—The issues were sent to the District Munsif on a misconception as to the facts, which has since been cleared.

I agree with Mr. Justice Kernan in the result. The defendant took nothing by his purchase of the rights and interests of the mortgagors, which had already been sold to plaintiff, and plaintiff is entitled to be replaced in possession of the land of which he was wrongly dispossessed by Court process issuing in execution of defendant's decree.

I do not wish to offer any opinion upon the other question of whether defendant's mortgage is still on foot and capable of being enforced. Recent legislation in regard to procedure has contracted the capacity to enforce several remedies by several suits, and it may be that defendant's mortgage right, if still existing, is barred of any further remedy. The second appeal will be dismissed with costs.

CALCUTTA HIGH COURT.

THE 28TH MAY 1879.

Before Mr. Justice Jackson and Mr. Justice McDonell.

DAIMODDEE PAIK* (*Plaintiff*) *vs.* KAIM TARIDAR and another (*Defendants.*)

Parol Evidence to vary Deed—Evidence of Conduct of Parties—Oral Stipulation at variance with a Written Document—Evidence Act (Act I. of 1872,) *s.* 92—*Registration Act (Act III. of* 1877)—*Construction of Acts.*

Evidence cannot be admitted to prove a contemporaneous oral stipulation varying, adding to, or subtracting from the terms of a written contract. Evidence of the acts and conduct of the parties to a written contract is not admissible if tendered solely in support of an oral stipulation varying its terms.

The plaintiff in this case claimed khas possession of certain lands, which he alleged to have been absolutely sold to him by the defendants in 1869; and which, after his purchase, he had re-let to them, taking from them a kabuliat in his favor for a term of one year. The defendants, he said, had, after the expiration of the first year, continued to hold possession of the lands and to pay him the stipulated rent until the year 1877, when, upon their failure to pay him the entire stipulated rent, he was compelled to institute a rent-suit against them, in which suit they filed an answer, asserting that the relation of landlord and tenant had never existed between them and the plaintiff; that they had never executed any kabuliat in favor of the plaintiff; and that, although they had in fact executed a deed of out-and-out sale in favor of the plaintiff, the real transaction was not a sale but a mortgage to secure a loan of Rs. 198, and that, since the execution of the deed mentioned, they had been paying the plaintiff not rent, but a yearly sum of Rs. 24 by way of interest on the loan. The plaintiff then stated that he had withdrawn the rent-suit.

In the Court of first instance evidence was tendered and recorded, on behalf of the defendants, to show that, notwithstanding that they had executed a deed of absolute sale to the plaintiff, the parties had really treated the transaction as a mortgage, and that the defendants had made payments to the plaintiff by way of interest, and not of rent.

The Court of first instance disbelieved the evidence of the defendants, and also held that, under s. 92 of the Indian Evidence Act

* *Vide* I. L. R., 5 Calc. 300.

(I. of 1872), it was not admissible even if it had been credible, and therefore gave a decree in favour of the plaintiff.

On appeal, the lower Appellate Court refused to disbelieve the defendants' evidence, and holding that s. 92 of the Indian Evidence Act, which was an Act to consolidate, define, and amend the law of evidence, made no change in the former rules of evidence, came to the conclusion that evidence of the acts and conduct of the parties was and had always been admissible to determine whether a document was or was not a mortgage, and, accordingly dismissed the plaintiff's suit with costs.

From this decision the plaintiff appealed to the High Court.

Baboo *Doorga Mohun Dass* for the appellant.

Baboo *Byddo Nauth Dutt* for the respondents.

The judgment of the Court (Jackson, J., and McDonell, J.) was delivered by

Jackson, J.—The point raised in this special appeal is one which we have considered on more than one occasion previously. We have no doubt that the Judge is in error in thinking that the parties are at liberty to rely upon the evidence furnished by the conduct of parties for the purpose of varying, adding to, or subtracting from the terms of a written contract. The evidence so given can only be evidence of an agreement which, as it was not written, must have been oral; and that is in distinct violation of the terms of s. 92 of the Evidence Act. The case decided by the Full Bench was before the Evidence Act came into force, and moreover, I understand, in that case there was a written instrument relied upon, viz., a kabuliat, and the evidence of conduct was adduced by the learned Chief Justice as giving support to that written instrument so as to make it probable that the parties had really intended a mortgage and not a sale out-and out. I am referred to the case of *Madhub Chunder Roy* v. *Gangadhur Shamunto* (1) heard by Mr. Justice Markby and myself, in which we both separately expressed the same opinion, which the present Division Bench expressed only last week in another special appeal. I observed in that case—"I confess that I have some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties which after all are only indications of such unexpressed unwritten agreement between the parties;" and Mr. Justice Markby said:—"It seems to

(1) 11 W. R., 450.

me very difficult to understand the distinction there drawn between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence of the parties contradicting the terms of such a contract being admissible." Although we both accepted the ruling of the Full Bench, which, it is to be borne in mind, was a ruling of three Judges against two, in regard to the particular case in which it was given, we think the judgment of the Munsif in this case, refusing to admit parol evidence, was right, and that the judgment of the lower Appellate Court must be reversed with costs.

I would add also, that it appears to me very material to consider this section (92) of the Evidence Act with the provisions of the Registration Act. It is highly important, and clearly in accordance with the intention of the legislature in passing the Registration Act, that parties should be compelled to register the precise contract which they have made. It would be extremely inconvenient if parties should register as a bill-of-sale what afterwards turns out on the evidence of conduct to be merely a mortgage.

Another observation I would make in this case is this: it appears to me to be no answer to the direct provisions of a particular section of an enactment, to say that the enactment was described in terms as an enactment to consolidate, amend and define the provisions of previously existing laws, and that the particular rule contended for is not to be found among the previously existing laws. It is sufficient if the provision relied upon is a part of the Act, whatever the description of the purposes of the Act may be.

CALCUTTA HIGH COURT.

THE 30TH MAY, 1879.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

JUNMAJOY MULLICK* (*Defendant*) *v.* DWARKANATH MYTEE (*Plaintiff.*)

Maps—Presumption as to accuracy—Indian Evidence Act (I. of 1872,) ss. 13, 83.

A map prepared by an officer of Government, while in charge of a khas mehal, Government being at the time in possession of the mehal merely as a private proprietor, is not a map purporting to have been made under the authority of Government within the meaning of s. 83 of the Indian Evidence Act (I. of 1872,) the accuracy of which is to be presumed, but such a map may be admitted as evidence under s. 13 of that Act.

* *Vide* I. L. R., 5 Calc. 287.

MITTER, J.—This is a suit to recover possession of 31 bigas and 5 cottas of land as appertaining to Mouza Hijultola. A dispute arose between the plaintiff and defendant as to the boundary of their respective villages during the survey of 1873. The defendant, who is the owner of Mouza Kasiabheri, claimed the disputed land as appertaining to his mouza. The survey authorities decided that question in favour of the defendant, and the lands in suit were included in the survey map of Kasiabheri. The plaintiff has, therefore, brought this suit for the rectification of the survey map, and also for recovery of possession of the lands in dispute. The Courts below have decreed the claim of the plaintiff.

One of the documents produced by the plaintiff in support of his claim, is a map of Hijultola, prepared by a Government officer when it was in the possession of Government as a khas mehal. The lower Courts have admitted this document as evidence in the case under s. 83 of the Evidence Act, and it seems to us, from the judgment of the lower Appellate Court, that it was to a very great extent influenced in its judgment by this document.

The contention raised before us in special appeal is, that the lower Courts were is error in treating this document as evidence under s. 83 of the Evidence Act ; in fact, the special appellant contends that this document is not admissible in evidence at all.

We are of opinion that the lower Courts were in error in holding that this document was admissible as evidence under s. 83 of the Evidence Act. That section says—"The Court shall presume that maps or plans, purporting to be made by the authority of Government, were so made and are accurate ; but maps or plans made for the purposes of any cause must be proved to be accurate." Now this map does not purport to be made by the authority of Government within the meaning of this section. It was a map prepared by an officer of Government while he was in charge of a khas mehal, the Government being in possession of that mehal merely as a private proprietor. It seems to us clear, therefore, that the document in question does not come within the purview of that section. But we are not prepared to hold, as contended for by the pleader for the appellant, that this map is not admissible in evidence at all. It may be admissible as evidence under s. 13 of the Evidence Act. But it is one thing to treat it as mere evidence of possession or of assertion of right under s. 13, and it is another thing to presume it to be accurate under s. 83 of the Act.

We think, therefore, that the error complained of has materially affected the merits of the decision of the Subordinate Judge in this case. We accordingly set aside his judgment, and remand the case to him for re-trial. Costs will abide the result.

CALCUTTA HIGH COURT.

THE 24TH APRIL, 1879.

Before Mr. Justice Jackson and Mr. Justice McDonell.

MOHESH CHUNDER SEN* (*Plaintiff,*)

versus

JUGGUT CHUNDER SEN (*Defendant.*)

Thakbust Map—Survey Map—Evidence—Suit for possession—Ejectment.

In a suit for possession, the only evidence for the plaintiff was a thakbust map which had been signed as correct by predecessors in title of both the plaintiff and defendant, and on which the lands in dispute were laid down as the lands of the plaintiff's predecessor.

Held, that the evidence was not sufficient to justify a decree for the plaintiff.

This was a suit to recover possession of certain lands, on the ground that they formed a part of a permanently settled taluk, which had been purchased by the plaintiff at an auction-sale for arrears of revenue on the 8th of March 1865; the defendant, who had admittedly been in possession from a time long anterior to the date of the auction-sale, denied that the land had ever formed a portion of the plaintiff's settled estate.

The only evidence offered by the plaintiff to show that the land in dispute formed a portion of his taluk at the date of the permanent settlement, was a thakbust map upon which it was so marked down. The map was signed by predecessors in title both of the plaintiff and the defendant. The Court of first instance considered this evidence to be sufficient and decreed the suit, but this decision was reversed on appeal. The plaintiff then brought this second appeal.

Baboo *Kali Mohun Dass,* Baboo *Doorga Mohun Dass,* Baboo *Bycunt Nath Dass,* Baboo *Bhyrub Chunder Banerjee,* and Baboo *Hurry Mohun Chuckerbutty* for the appellant contended, that the thakbust map alone was sufficient to entitle the plaintiff to a decree in the absence of all rebutting evidence, especially where the predecessor of the defendant had by his signature admitted the map to be correct. They cited

* I. L. R, 5 Calc. 212.

Oomut Fatima v. *Bhujo Gopal Doss* (1), *Ram Narain Dass* v. *Mohesh Chunder Banerjee* (2), *Shusee Mookhee Dassee* v. *Bissessuree Debee* (3), and *The Collector of Rajshahye* v. *Doorga Soonduree Debia* (4).

Baboo *Sreenath Doss*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Mohini Mohun Roy* for the Respondent.

The judgment of the Court was delivered by

JACKSON, J. (McDonell, J., concurring)—The plaintiff, who was the auction-purchaser of a taluk, sued to recover from the defendants, who were very numerous, a certain quantity of land. He claimed this land of course as having been a part of the originally settled estate.

As to the title set up, the plaintiff, in the particular case which has been argued before us, relied chiefly upon a thakbust map, which bore the signature of one Anundoo Chuckerbutty, who was the defendant's predecessor in title.

The Judge (who reversed the judgment of the Munsif) refused to consider this thakbust map so adduced as being absolutely conclusive evidence, and so dismissed the plaintiff's suit.

The plaintiff on second appeal before us objects, that the Judge has described this map as evidence *quantum valeat*, which he seems to consider an inadequate application of the thakbust map as a piece of evidence; and it is contended, on the authority of a decision to which I was a party, that a survey map is sufficient, when there is no rebutting evidence to make out the title of the plaintiff. The special appellants' vakeel admitted that he could not put his case so high as to argue that the Court below was absolutely bound to give judgment in his favour upon this piece of evidence, but he was very anxious to show that the Judge was entangled in the meshes pernicious error which, we are told, is founded upon the judgment in the case of *The Collector of Rajshahye* v. *Doorga Sounduree Debia* (5), which error was dispersed by the Judgment of myself and another Judge of this Court already referred to.

Now I have no doubt that, in general, where the question is simply one of title, and the available evidence is proof of possession at a particular period, a survey map ought to be, and is most cogent evidence. But the matter of which the plaintiff had to bear the burden of proof in this case, as observed by the Judge, is not title in general, but he had to prove that the land which he claimed, which is not in his

(1) 13 W. R., 60.
(2) 19 W. R., 202.
(3) 10 W. R., 343.
(4) 2 W. R., 210.
(5) 2 W. R., 210.

possession and was not in the possession of the last owner of the taluk, was land which formed part of the taluk at the time of the permanent settlement; and in my judgment the mere circumstance that a particular owner had possession of a piece of land at a specified time, some years before the bringing of the suit, is not conclusive, or nearly conclusive, evidence of that fact. I do not find any indication of the error under which the Judge is supposed to be labouring, and I do not think, considering the way in which he has dealt with the evidence in disposing of the appeal before him, we should be justified in disturbing his judgment, unless we are prepared to say, and I am certainly not prepared to say, that, in such a case as this, a survey map is conclusive evidence. The special appeal is dismissed with costs. This judgment will apply to the other two appeals, Nos. 1852 and 1869, of 1878.

CALCUTTA HIGH COURT.

THE 29TH APRIL, 1880.

(Before Mr. Justice Jackson and Mr. Justice Tottenham.)

UGRAKANT CHOWDHURI and others *(Plaintiffs), Appellants,*

versus

HURROCHUNDER SHIKDAR and others *(Defendants), Respondents.*

For Appellants —Babu Doorga Mohun Doss.

For Respondents.—Babus Sreenath Doss and Gyanendra Nath Doss.

Document 30 *years old—Genuineness—Section* 90, *Act I.,* 1872.

A judge does not discharge himself of his duty in regard to a document when he simply looks at it and says he has no reason to doubt its genuineness. The mere production of an instrument purporting to be 30 years old does not absolutely entitle the person producing it to a decision that it is a genuine, valid instrument. If the Court is satisfied as to the production of the instrument from what it considers to be proper custody, all that it will be bound to presume, under S 90 of the Evidence Act, is that the signature attached to it is in the hand writing of the person, whose hand-writing it purported to be.

We find ourselves obliged very reluctantly to order a second remand in this case. The order with which the case was sent back to the Lower Appellate Court in January 1879, was sufficiently precise. The Judge on the case going back appears to have done that which was, perhaps, not absolutely open to him, *viz.*, admitted fresh evidence, and the plaintiffs contend that owing to the manner in which that was done.

they were put at a certain disadvantage. However that may be, the Judge we find refused credit to the witnesses whom the defendants called to prove that the plaintiffs had knowledge of their claim to the *miras* tenure, and he relied altogether upon certain documents which the defendants have put in. He says: "It remains to be seen what the documentary evidence shows. The Pottah certainly does not show by itself that the plaintiffs knew for more than 12 years of the title set up by the defendants. There is nothing to show that it came to their notice before 1866, which is only 10 years before the institution of the present suit in the Munsiff's Court. As to its genuineness, I see no reason to doubt that." Now a Pottah, which is an instrument purporting to confer on the defendants an absolute right to hold land for ever at a fixed rate, is a very important instrument, and a Judge does not discharge himself of his duty in regard to that when he simply looks at it and says he sees no reason to doubt the instrument. This is a matter of which the proof lay wholly upon the defendants, and they had to satisfy the Court that this was a genuine, valid instrument. The provision of the Evidence Act, which relates to documents of 30 years of age is one which requires great care in its application, especially in this country. It would be very serious, indeed, for persons owning land, if the mere production of an instrument purporting to be 30 years old, absolutely entitles the person producing it to a decision, that it is a genuine, valid instrument. All that Section 90 says is: "where any document purporting or proved to be 30 years old, is produced from any custody which the Court, in the particular case, considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the hand-writing of a particular person, is that person's hand-writing," that is to say, if, in this case, the court was satisfied as to the production of this instrument from what it considered to be proper custody, it would only be bound to presume that the signature attached to it was in the hand-writing of the person, whose hand-writing it purported to be, and still much would be left before the defendants would be entitled to the benefit of that instrument as establishing their title. They would have to show that the person whose hand-writing the signature was, was a person entitled to grant such a document. And in like manner, as to the dakhilas, the Judge says: "I see no reason to doubt the genuineness of those upwards of 30 years old, of which no attestation is required." Here again the utmost that the court would be entitled to presume, and that it could only do with con-

siderable caution, is that they were signed by the person whose signature they purported to be. It would still remain to be shown that the person signing was authorised to sign and that his signature bound the plaintiffs. In these circumstances, the Judge says: "the plaintiffs producing no evidence at all, I consider that the pottah is genuine and that the receipts admitted are genuine and I consider that between them, they prove both the validity of the claim set up by the defendants, and the plaintiffs' knowledge of it for more than 12 years prior to suit." This, as I have already said, was a case in which the burden of proof, as regards this issue, lay upon the defendants. They are bound to prove the case. The Lower Appellate Court had not sufficient materials before it for coming to the conclusion either that the pottah was genuine, or that the receipts, if genuine, were binding on the plaintiffs. It is said no doubt that this pottah had been already put in evidence in a previous suit between the parties in the year 1866, and the respondents rely upon the result of that suit as being a decision in their favor, that they had a valid *miras* tenure. It appears to us that the decision is far from going that length. The pottah put in by the defendants was in answer to a suit by the plaintiffs claiming enhanced rent, and the result of the suit was that the plaintiffs failed to obtain the enhanced rent, but although the respondent's pleader read to us such parts of the decision as he thought fit, we find nothing in it like a decision between the parties that the plaintiffs had a valid *miras*. Under these circumstances, we think the case must go back. Of course it may be that the defendants may fail to make out a valid *miras* tenure and yet the plaintiffs may not be entitled to a decree, because the defendants may be holding this land under such a tenure that they are not liable to be ousted possibly at all, at any rate without sufficient notice. These points will have to be considered by the Court when it disposes of the question of *miras*. No application being made before us for leave to admit fresh evidence, the case must be disposed of on the evidence, as it stands.

The costs of this appeal will abide the result.

CALCUTTA HIGH COURT.

THE 8TH APRIL, 1879.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

NANACK CHAND* and another (*Plaintiffs,*)

versus

TELUCKDYE KOER and others (*Defendants*).

Rival Mortgage Decree-holders—Priority of Mortgage—Priority of Possession.

In a suit for possession between two purchasers, who had bought the same property at two several auction-sales under decrees obtained on two several mortgage-bonds,—*held*, that no question could arise as to which mortgage was prior in point of time, but that the real question to be decided was, which of the parties could prove a prior title to possession.

GARTH, C. J. (Prinsep, J., concurring.)—In this case both the plaintiffs and the defendants appear to have taken mortgage-bonds from the same person, pledging the same property on the same day. Both subsequently obtained decrees upon those bonds against the mortgagor.

The defendants, it is found by the Court below, got their decree first, and under that decree they bought the right, title, and interest of the mortgagor in the mortgaged property and obtained possession of it.

The plaintiffs afterwards, under their decree, put up for sale and bought the right, title, and interest of the mortgagor; and they now bring this suit for the purpose of recovering the possession of the property from the defendants.

This suit being, therefore, only for possession on the strength of that purchase, the question is, whether the plaintiffs can prove a better right to such possession than the defendants.

The Subordinate Judge has decided that the defendants' right is preferable, because their purchase of the mortgagor's interest was prior in date, and he accordingly dismissed the plaintiff's suit.

It is now contended on appeal, that both the lower Courts should have tried not only the question whose purchase was first, but also whose mortgage was first.

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* I. L. R., 5 Calc. 265.

But that question, we think, does not arise in this suit. The right to the possession of the property cannot depend upon which of the mortgages was first.

The defendants, when they purchased the interest of the mortgagor, obtained the present right to possession, although in equity they might only have acquired it as trustees for the mortgagor and subject to his right to redeem the property : see *Kamini Debi* v. *Ram Lochun Sircar* (1), *Brajanath Kundu Chowdhry* v. *S. M. Gobindmani Dasi* (2).

The plaintiffs may, if they please, raise the question of the priority of their mortgage in a suit properly framed for the purpose, but in this suit that question has not been, and could not properly have been, tried.

The appeal must be dismissed with costs.

CALCUTTA HIGH COURT.

THE 19TH MAY, 1880.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

DIRGOPAL LAL* and others (*Defendants,*) *vs.* BOLAKEE (*Plaintiff*).

Several Mortgages of the same Property—Decrees on the Mortgage-bonds—Suit for Possession—Priority of Purchase—Priority of Possession.

A, on the 11th March 1868, took a mortgage-bond of certain property, and obtained a money-decree on the bond on the 23rd January 1869. Under this decree the mortgagor's interest was put up for sale and purchased by A on the 29th April 1870. B, on the 3rd November 1868, took a mortgage-bond on the same property, and obtained a decree thereon on the 31st May 1869. Under this decree the mortgagor's interest was sold, and purchased by B. on the 22nd April 1870. B took possession of the property on the 18th May 1872. In a suit by A for recovery of possession ;—

Held, that B. was entitled to retain possession as against A, although his own interest might be merely that of a trustee for the mortgagor, and might be subject to A's mortgage lien, if he took proper proceedings to enforce it.

GARTH, C. J. (Prinsep, J., concurring).—The plaintiff took a mortgage-bond from Chemnarain on the 11th of March 1868. He obtained a money-decree on that bond on the 23rd of January 1869 ; and under that decree he had the mortgagor's interest put up for sale on the 29th of April 1870, and purchased it himself. The defendants took a mortgage-bond of the same property in November 1868, upon which they

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* I. L. R., 5 Calc, 269.

(1) 5 B. L. R , O. C., 451.

(2) 4 B. L. R., O. C., 83.

obtained a decree on the 31st of May 1869; and under that decree, the mortgagor's interest was sold and purchased by the defendants on the 22nd of April 1870, a few days before the plaintiff's purchase.

Upon these facts, the lower Appellate Court has decided in favour of the plaintiff, upon the ground that his mortgage was first and his decree first. But as this is a suit for possession, we consider that the party who first purchased the mortgagor's interest and obtained possession, is entitled to retain possession as against the other, although his own right may be merely that of a trustee for the mortgagor, and may be subject to the plaintiff's mortgage lien, if the latter takes proper proceedings to enforce it.

The judgment of the Court below will, therefore, be reversed, and that of the Munsif's restored with costs in all the Courts.

CALCUTTA HIGH COURT.

THE 22ND MAY, 1879.

Before Mr. Justice Pontifex.

AUHINDRO BHOOSUN CHATTERJEE,*

versus

CHUNNOOLALL JOHURRY and another.

Mortgage—Suit by a Second Mortgagee against Mortgagor and Third Mortgagee—Account.

In a suit by a second mortgagee against his mortgagor and a third mortgagee, asking for an account and sale,—the Court directed an account to be taken, not only of what was due to the plaintiff, but also of what was due to the third mortgagee.

This was a suit by a second mortgagee against the mortgagor and a third mortgagee. It appeared that on the 23rd September 1878, the defendant Chunnoolall Johurry mortgaged certain properties in Calcutta to the plaintiff to secure the re-payment of the sum of Rs. 4,000. These properties were, at the time of the mortgage to the plaintiff, under mortgage to one Bolai Dass Mullick, who had then obtained a decree for an account and sale, and the mortgage to the plaintiff was subject to the mortgage in favour of Bolai Dass Mullick, who had not,

* I. L. R., 5 Calc. 101.

however, at the time of the institution of the present suit, proceeded to sell the properties, and the plaintiff stated that he had no desire to redeem them from him. After the mortgage to the plaintiff, the defendant Chunnoolall Johurry again mortgaged the properties in question to the defendant Protab Chand Mullick. The plaintiff in the present suit asked for an account and sale of the mortgaged properties if not sold at the instance of Bolai Dass Mullick, and that if they had been sold, then that the plaintiff might be paid out of the surplus.

Mr. *N. Haldar* for the plaintiff.

Mr. *C. C. Dutt* for the defendant Protab Chand Mullick.

The defendant Chunnoolall Johurry did not appear.

PONTIFEX, J. (made the following decree):—Decree for an account of principal and interest due on the mortgage to the plaintiff, in default of payment the property to be sold and plaintiff to be paid first, after satisfaction of the decree of Bolai Dass Mullick if there is then a surplus, account to be taken of what is due to Protab Chand Mullick, and surplus to be applied for payment of his claim. If property has been sold under previous decree, claims to be satisfied out of surplus.

CALCUTTA HIGH COURT.

THE 25TH MAY, 1880.

Before Mr. Justice James Sewell White, and Mr. Justice Alexander T. Maclean.

RAMESSURY DASSI, Widow of the late RAM COOMAR ROY, ... } *Petitioner, Appellant,*

versus

DOORGA DASS CHATTERJEE, *Opposite Party, Respondent.*

For Appellant.—Babu Rash Behary Ghose.

For Respondent.—Baboo Bama Churn Bannerjee.

Execution proceedings void for want of Notice, where required under s. 248, C. C. P.—Power of Court to set aside irregular proceedings.

Held that the omission to serve on the judgment-debtor the notice required by s. 248 of the Procedure Code affects the validity and the regularity not only of the execution sale but of the entire proceedings in execution and that the Court should, quite irrespective of whether the irregularity was one under s. 311, set the execution proceedings aside as soon as it became aware that no notice was served.

Every Court has an inherent right to see that its process is not abused or irregularly issued, and may, as a matter of course, set aside, notwithstanding the absence of any express provision in the Code, all irregular proceedings, provided the rights of third parties are not affected.

The respondent in this case obtained a decree against the husband of the appellant on the 8th April 1878, and before application was made for execution the husband died. On the 29th March 1879, the respondent applied for execution of the decree upon a tabular statement. In the judgment-debtor column of this statement the applicant's name is entered under the description of Ramessuri Dassi widow of Ram Coomar, and in the column for the name of the person against whom execution is sought, the appellant's name is introduced as being that person. Upon this application, the Moonsiff directed the property mentioned in the tabular statement to be attached and sold. The property was accordingly sold in June 1879 and bought by the respondent himself. Within a month of the sale, the appellant applied to set it aside on the ground of irregularity.

One of the objections raised is that the sale was not duly proclaimed at or near the spot where the attached property is situate.

We pronounce no opinion upon the validity of this objection, as it appears to us that there is a ground upon which the appellant ought to have succeeded in the court below and it is this, that the court directed the attachment and sale of this property to proceed without having previously served a notice upon the appellant in accordance with section 248 of the Code. This section directs that the court shall issue a notice to the representative of a deceased judgment-debtor before directing the decree to be executed.

An excuse for the court so far as directing attachment to issue is concerned may, no doubt, be found in the form of the tabular statement. Such a tabular statement ought not to have been put in unless the widow had actually been herself a party to the suit and had been sued as heir of her husband. It was calculated to mislead the court. It is said by the appellant that it was put in with the intention of misleading the court, but whether that was the intention or not, it did in fact mislead the court. But when this irregularity was brought to the attention of the court, we think it ought at once to have allowed the objection of the appellant. Instead of that the only notice which the court takes of the objection in its judgment is this: "It is pointed

out that no notice was served on the judgment-debtor as required by section 248 of the Procedure Code, but this omission cannot vitiate the sale."

We think that the omission to give such notice affects the validity or at all events the regularity not only of the sale but of the entire proceeding of the respondent in applying for execution and that, quite irrespective of whether the irregularity was one under section 311, the court should have set the execution aside as soon as it became aware that no notice had issued.

No question arises in this case as to whether the interest of any third party would be affected by setting aside the execution proceedings; because the judgment-creditor is himself the purchaser and he is the very party who has led the court into the irregularity which has been committed.

It has been objected that there is no section in the Code which authorises the Lower Court to set aside these proceedings.

But we think it is not necessary to invoke a section of the Code for the purpose. Every court has an inherent right to see that its process is not abused or does not irregularly issue and may set aside all irregular proceedings as a matter of course, provided that the interests of third persons are not affected.

The order that we shall make, therefore, is one reversing the Moonsiff's order, and directing that the proceedings taken against the appellant in execution of this decree including the sale be set aside *ab initio.*

It may be necessary, unless the appellant admits assets and pays the amount of the decree, to take hereafter proceedings to execute it, but these proceedings must be commenced afresh. A tabular statement must be put in in proper form, and a proper notice must be sent to the appellant so that she may have an opportunity of paying the money or setting forth any defence she may be advised to make.

The appeal is allowed with costs, one Gold Mohur.

The respondent will not be allowed the costs of any of the execution proceedings taken against the appellant which we set aside by this our order.

CALCUTTA HIGH COURT.

THE 25TH APRIL, 1879.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

NARAIN MAL* (*Objector*) *vs.* KOOER NARAIN MYTEE (*Petitioner*).

Act XXVII. of 1860—*Right to Certificate of a Son adopted after the death of his adoptive Father.*

A son adopted in pursuance of an *unoomoti puttro* (power to adopt), some time after the death of his adoptive father, does not require, and is not entitled to obtain, a certificate under Act XXVII. of 1860, to enable him to collect debts in respect of the properties left by his adoptive father, which accrued due while they were under the management of his adoptive mother.

The estate of the adoptive father, if the adoption is a good one, vests immediately on the adoption of the adopted son, and debts to it, if they accrued due after the death of the adoptive father, are debts recoverable by the adopted son in his own right and not as representative of his adoptive father.

In this case one Juggunnauth Mal died in Falgoon 1270 (March 1864), having, as the petitioner alleged, previously, on the 23rd Assin 1270 (8th October 1863), executed an *unoomoti puttro*, or power of adoption, in favour of his wife, who was then pregnant, empowering her to adopt a son in case of the child then in her womb dying without issue.

After the death of Juggunnauth Mal, his widow gave birth to a daughter, and shortly afterwards applied for, and obtained, a certificate under Act XXVII. of 1860 to collect the debts due to her husband's estate. Some time afterwards, the daughter having died in infancy, the widow acting under the *unoomoti puttro*, adopted the petitioner, who, thereupon, applied for a certificate under Act XXVII. of 1860, and was opposed by the objector Narain Mal, who, had there been no adoption, or if the adoption had been without authority, would have been, subject to the widow's estate, the heir of Juggunnauth Mal.

The lower Court held, that both the *unoomoti puttro* and the adoption were fully proved, and granted a certificate to the petitioner.

Against this order the objector appealed to the High Court.

Baboo *Bhowany Churn Dutt* and Baboo *Bhowany Churn Banerjee* for the appellant. Baboo *Kali Mohun Dass* for the respondent.—The objection relied upon by the appellant was, that the lower Court was

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* I. L. R., 5 Calc. 251.

wrong in granting a certificate to the petitioner without any evidence to prove that any debts due to Juggunnauth were still due and could be collected.

The judgment of the Court was delivered by

MITTER, J. (TOTTENHAM, J., concurring).—We think that, upon the facts stated in the petition, the applicant is not entitled to a certificate under Act XXVII. of 1860. The petition is based upon an *unoomoti puttro* alleged to have been executed by Juggunnauth Mal on the 23rd Assin 1870 (8th October 1863), he having died in Falgoon (March 1864) of that year, and if this *unoomoti puttro* be a genuine document, the estate of Juggunnauth vested in the applicant as soon as he was taken in adoption.

The present application is made to collect the debts due in respect of the properties left by Juggunnauth while they were under the management of the alleged adoptive mother Doorgamonee. The petitioner cannot possibly have a *locus standi* under the provisions of Act XXVII. of 1860. The Act applies to cases where applications are made by representatives of deceased Hindus, Mahomedans, and others not usually designated as British subjects, to collect the debts which are payble in respect of the estates of such deceased persons. In this case it would appear, upon the applicant's own showing, that the debts were payable to himself, because they had accrued due during his minority, while his estate was under the management of Doorgamonee, his alleged adoptive mother. It is quite clear, therefore, that there was no necessity for applying for a certificate under Act XXVII. of 1860, and no right to obtain one.

Upon this ground alone we think that the order of the lower Court ought not to stand. We, accordingly, reverse that order with costs.

CALCUTTA HIGH COURT.

THE 25TH APRIL, 1879.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

GOURAH KOERI,* (*Petitioner,*)

versus

GUJADHUR PURSHAD, (*Opposite Party*).

Minor, Rights of, in a Family governed by the Mitakshara Law—Certificate under Act XXVII. of 1860—*Certificate under Act XL. of* 1858.

K. B., a Hindu governed by the Mitakshara law, died, leaving two sons, G. P. and K. P., a minor, and a widow G. K., the mother of K. P. *Held*, on applications by G. P. and G. K. respectively to obtain certificates under Act XXVII. of 1860, to collect the debts due to the estate of K. B, that G. P. alone was entitled to obtain such a certificate, and on the application of G. K for a certificate to take charge of the estate of her minor son K. P. under Act XL. of 1858, that as there was no evidence that K. P. was entitled to any *separate* estate she was not entitled to such a certificate. *Held* also, that if occasion should arise, a suit might be filed in the name of the minor by his mother as his next friend, without her having first obtained a certificate under Act XL. of 1858, and without her having previously obtained permission from any Court.

Mr. *Branson* and Baboo *Cally Mohun Ghose* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Troylokonath Dutt* for the respondent.

The facts of this case sufficiently appear from the judgment, which was delivered by

MITTER, J.—One Koonjo Behary died on the 7th June 1878, leaving him surviving two sons, Gujadhur and Kanny, and his widow Musst. Gourah Koeri. Gujadhur and Kanny are step-brothers, Kanny's mother being Gourah Koeri, and Gujadhur's mother had predeceased her husband. Gujadhur had attained majority before his father's death, and Kanny is still a minor. These three appeals arise out of three applications made to the lower Court. Two of these, by Gujadhur and Musst. Gourah Koeri, respectively, were made for obtaining certificates under Act XXVII. of 1860 to collect the debts due to the estate of the deceased Koonjo Behary. The third application was made by Gourah Koeri to obtain a certificate under Act XL. of 1858 for the administration of her minor son's property.

* I. L. R., 5 Calc. 219.

The district Judge has granted to Gujadhur a certificate under Act XXVII. of 1860 to collect the debts due to his father's estate, and has rejected both the applications of Musst. Gourah Koeri.

Upon the evidence it appears to us clear, that Koonjo Behary and his two sons formed a joint Mitakshara Hindu Family and no partition has taken place since the father's death. The two brothers with the mother, therefore, constitute a joint Hindu family governed by the Mitakshara law. That being so, the interest of the minor brother in the joint family estate is not property of which one can take charge. This view is supported by the cases of *Sheo Nundun Singh* vs. *Mussamut Ghunsam Kooere* (1) *and Mussamut Ajhola Kooeree* vs. *Baboo Digambur Singh* (2).

It is clear from the provisions of Act XL. of 1858, that a certificate for the administration of a minor's property can only be granted, where it is of such a nature that it is capable of being taken charge of.

The minor in this case not being shown to possess any such property, the District Judge, we think, is right in refusing the application of Musst. Gourah Koeri under Act XL. of 1858.

The learned counsel who appeared for her before us, relied upon a decision of this Court—Mussamut Etwari *vs.* Ram Narryan Ram(3). In this case, the question whether the interest of a member of a joint family governed by the Mitakshara law, in the joint family estate, is such property as can be taken charge of by a guardian, was not raised. This case seems to have been cited by the District Judge in the judgment which formed the subject of appeal in the decision already referred to, *Mussamut Ajhola Kooeree* vs. *Baboo Digambur Singh* (2). We are, therefore, of opinion that the Judge was right in rejecting the appellant's petition to be appointed the administrator of the minor's property. We may observe here that, in the view taken by this Court in the case of *Sheo Nundun Singh* vs. *Mussamut Ghunsam Kooeree* (1), and now adopted by ourselves, it is not necessary that the appellant should be furnished with a certificate under Act XL. of 1858 to enable her to bring a suit for partition on behalf of her minor son, for the effect of our decision is, to hold that s. 3 of that Act has no application to the minor's undivided share of the family property. We think, too, that the District Judge is mistaken in supposing that even permission of the Court under

(1) 21 W. R., 143. (2) 23 W. R., 206.
(3) 4 B. L. R., Ap., 71.

Chap. XXXI. of the Code of Civil Procedure to represent the minor in such suit will be necessary. The suit may be brought in the minor's own name, his mother being made his next friend. For this, no permission is required.

We are also of opinion, that the family being joint, the District Judge has properly exercised his discretion in granting the certificate, to collect the debts due to the estate of the deceased father, to the eldest son, who is naturally the *kurta* of the family.

The result is, that all these appeals are dismissed with costs.

CALCUTTA HIGH COURT.

THE 24TH MARCH, 1880.

Before Mr. Justice G. G. Morris and Mr. Justice H. T. Prinsep.

SREEMUTTY ROWSHUN BIBEE widow of the late MOONSHEE NUSEERROODDEEN, MOONSHEE ALI KURIM and MOONSHEE ALLY AHMED, ... *Plaintiffs, Appellants,*

versus

MOONSHEE HUSSAN ALLY, *Defendant, Respondent.*

For Appellants.—Mr. J. D. Bell and Moulvi Serajul Islam.

For Respondent.—Baboo Kashi Kant Sen.

Suit for contribution—Contract Act, Ss. 69 and 70.

Where a person has a joint interest in a tenure, he is liable for his share of the rent, though he is not one of the recorded tenants. Where the superior landlord refused to recognize him as a tenant and sued and obtained decrees against the recorded tenants, and the latter in their turn sued and obtained decrees for contribution against the one not recorded, and where the recorded tenants made an arrangement with the superior landlord by which on condition of prompt payment the rate of rent was reduced, and they did pay rent at the reduced rate, *Held* that the tenant not recorded was liable to make good his share. His plea, that he was not bound to pay his share, because he was no party to the arrangement, was bad and could not prevail.

MORRIS, J.—In this suit for contribution, the first Court appears to us to have laid down the law correctly and its judgment has been misapprehended by the Court on appeal. There is no question that though the plaintiffs were the sole recorded tenants of the talook Ramjoy Oojeer, yet the defendant possessed a limited joint interest in it, was recognized as a co-

parcener by the plaintiffs and was liable for his share of the rent, inasmuch as he derived profit from that share. There is also no question that the superior landlord, the Moharajah, refused to recognize the defendant as a tenant of the Talook and had sued the plaintiffs alone for rent at an enhanced rate for three years prior to 1281 and obtained decrees against them, and that in their turn the plaintiffs in a suit for contribution obtained a decree against the defendant for his share of the rents of these years. In this state of things, the plaintiffs made an arrangement with the Moharajah by which on condition of prompt payment, the rent for the years 1282, 1283 and 1284 was reduced from Rs. 2500 per annum to Rs. 2000 per annum. They accordingly paid the rent at this rate and then called upon the defendant to make good his share. The defendant refuses on the ground that he was no party to the arrangement with the Moharajah and that the payment made by the plaintiffs was a voluntary and not compulsory payment on their part. It is, however, clear as pointed out by the Moonsiff that the defendant, as holding a certain interest in the Talook, is under a legal obligation to pay his share of the rent due in respect of it, and it is equally clear that if the plaintiffs had withheld payment of the rent, they would not only have lost the benefit of the reduction in the rent which the arrangement effected but they would have at once subjected themselves to the loss which a suit by the Moharajah at the former enhanced rate would have necessarily entailed as well as to interest. On the pretext of his being no party to the arrangement, the defendant seeks to reap and does indeed reap the full benefit of it and at the same time to avoid all payment of his share of the rent for the three years in question. Such a course is entirely opposed to the provisions of sections 69 and 70 of the Contract Act and no Court of equity would allow it. We, therefore, set aside the order of the Subordinate Judge and affirm that of the first Court with costs both in this and in the Lower Appellate Court.

CALCUTTA HIGH COURT.

THE 9th APRIL, 1879.

Before Mr. Justice Jackson and Mr. Justice McDonell.

JOHOORY LALL* (*Plaintiff,*) *vs.* BULLAB LALL (*Defendant*).

Interest on Arrears of Rent.

The mere non-enforcement by a landlord, even for a series of years, of his right to interest upon arrears of rent, does not amount to a waiver of such right. (Marshall, 40 and 394 referred to).

JACKSON, J. (McDonell, J., concurring) in delivering judgment said :—I think now that it would be monstrous to say that the mere omission to claim interest for past years from a tenant, who did not pay his rent on due dates, should be considered a waiver of the right to claim interest for all time.

We think the decision of the lower Appellate Court is erroneous and that the case should go back to that Court in order that it may consider whether there is any ground for exercising the discretion for withholding interest for the particular arrears due.

CALCUTTA HIGH COURT.

THE 6TH MAY, 1880.

Before the Hon'ble G. G. Morris, and the Hon'ble H. T. Prinsep.

RAM GOTI SHAHA, *vs.* JOMA GHAZI.

Summary of trial—Jurisdiction—Offence.

Whether a case is triable summarily or not must be determined by the offence complained of, and not by the offence proved. *Held* also, that a Magistrate is bound to convict an accused person of the highest offence which is in his opinion proved and not to select a minor offence which forms one of the component parts of a more serious offence, because it conforms more with his own ideas of justice.

We agree with the Sessions Judge that in holding a Summary trial under Section 222 of the Code of Criminal Procedure the Joint Magistrate has acted without jurisdiction.

The complaint was made of theft of paddy and on his preliminary examination the complainant stated the value of the paddy carried off to be about 60 Rs. It has been repeatedly held by this Court that in order

* I. L. R., 5 Calc. 102.

to give a Magistrate jurisdiction to try a case summarily, the complaint must be regarding an offence which may be so tried, the fact that the offence proved is one of that description not being sufficient. We would refer the Joint Magistrate to the cases reported in 21 W. R. 89; 22 W. R. 29; 24 W. R. 21; 22 W. R. 65 and 25 W. R. 19. The case last-mentioned is particularly in point. The judgment is to this effect. "The evidence might fail to show that the property was in fact worth so much, or it might fail to establish the charge against the accused or even to prove that any offence had been committed, but it is the complaint which if proceeded with at all, must determine the mode of procedure. The estimate formed by the Magistrate could only be arrived at after the evidence had been recorded and could not retrospectively warrant a mode of trial which was originally illegal."

We observe too that the Magistrate has convicted the accused of Criminal trespass, an offence triable summarily notwithstanding that the original complaint as has been already mentioned was of theft of paddy of the value of 60 Rupees. The Joint Magistrate justifies this by stating that "it is not necessary to accuse the prisoner of every offence in the Penal Code to which his conduct may amount. In particular when crops have been taken, not furtively, but still without warrant of law, and with high hand, the act generally amounts to Penal Code theft, but it is more usual as it is more safe and convenient to convict only of the minor offence of Criminal trespass and the ends of justice are thereby satisfied. That is the practice of many experienced Magistrates and I have never heard exception taken to it. The accused Ram Guti Shaha may have been guilty of theft, but he was certainly guilty of criminal trespass and a conviction of the latter offence is not invalid because a conviction for the former could have been maintained."

We cannot approve of this view of the duties of a Magistrate. A Magistrate is bound to convict an accused person of the highest offence which is in his opinion proved and not to select a minor "offence" which forms one of the component parts of a more serious offence, because it conforms more with his own ideas of justice. It is his duty to administer the law as he finds it and not to put his own gloss on it. In the case now before us by convicting the accused of criminal trespass when he has committed what the Magistrate terms "Penal Code theft," the Magistrate has endeavoured to justify the proceedings of a summary trial. The Magistrate may consider that in so acting "the ends of justice" have been satisfied, but he seems to forget that he has by this

course of procedure deprived the accused of the right of appeal to which he was entitled if the law had been rightly administered. If this manner of dealing with cases is as prevalent as the Magistrate states, we must point out that it is decidedly opposed to reported rulings of the High Court in reported cases and we regret the necessity for again reporting what ought to have become well known. We quash the proceedings of the summary trial held by the Joint Magistrate and direct that Joma Ghazi be released. Under the circumstances we are of opinion that no further proceedings should be taken against him.

CALCUTTA HIGH COURT.

THE 27TH FEBRUARY, 1880.

Before the Hon'ble G. G. Morris and the Hon'ble S White, Judges.

In the matter of BEEOGEE BHUGUT.

Court Fee—Criminal Appeal—Act VII. of 1870, *Section* 19, *clause XVII.*

Petition in Criminal Appeal No. 1460 *of* 1879, *from the decision of the Sessions Judge of Sarun, dated the* 30*th December* 1879.

Babu Pran Nath Pundit, for Petitioner.

In an appeal by a prisoner to the High Court, the Court fee prescribed by Schedule II., No. 1(d) of the Court fees' Act is not required

The following is the material part of the petition:

"Your Lordships' petitioner further prays that under the Provisions of Clause XVII., Section 19, Act VII. of 1870, this petition of appeal may be admitted without the levying of the Court fee prescribed by Schedule II., No. 1(d) of the same Act or that your Lordships will be pleased to issue a rule on the Crown to shew cause why the exemption prayed for should not be granted."

The order of the Court upon this was as follows:—

MORRIS, J.—(White, J., concurring).—Admit the appeal without any Court fees, send for the record and issue usual notices.



THE

LEGAL COMPANION.

July, 1880.

We are given to understand that some courts object, under s. 13,* Legal Practitioners' Act, 1879, to a pleader's taking instructions from the son, husband or any other relation of a party unless he be the recognized agent of such party. We think it, therefore, necessary to direct their attention to the following sentence of Blackstone:—" A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct; for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience." Stewarts' edition, vol. i., p. 464.

We regret to find now and then instances of cases in which the courts improperly exercise their powers of discretion in ordering the immediate arrest of defendants while in court for sums decreed against them. The object of the legislature in enacting s. 256 of the Code of Civil Procedure and s. 19 of the Mufassal Small Cause Courts Act, does not seem to have been to enable the courts to summarily punish parties making false defences or in any other manner incurring the displeasure of the Courts, by ordering their immediate arrest; if it had been so, we fail to understand why the legislature would limit the operation of the provisions only to decrees for sums not exceeding rupees one thousand. A defendant falsely denying his liability for more than Rs. 1000 could never have been a greater object of favor to our legislature than one who denies his liability for a less sum. The only object, in our opinion, which the legislature had in view in enacting those sections, was to provide for cases in which the defendant would altogether evade payment or in which he might harass the decree-holder in obtaining satisfaction of his decree, unless immediate execution against the person

* S. 13, Act XVIII. of 1879 is as follows:—

"The High Court may also, after such enquiry as it thinks fit, suspend or dismiss any pleader holding a certificate as aforesaid who takes instructions in any case except from the party on whose behalf he is retained, or a private servant of such party, or some person who is the recognized agent of such party within the meaning of the Code of Civil Procedure, or &c., &c., &c."

or personal property of the judgement-debtor were not granted. Where a party has sufficient moveable or immoveable property within or without the jurisdiction of the court, it seems like a wanton abuse of the power to grant immediate execution against him simply because in the opinion of the court his defence is false. Unless the judges properly exercise their discretion in these matters, people would be afraid of attending courts in person even in cases where the claim against them might be totally false.

We find the following passage in the judgment of the Calcutta High Court (Jackson, J.) in the case of Becharam Pal *vs.* Bhugwan Chunder Ghose, decided on the 11th December last:—"*It is*, as I observed during the argument, *the business of the plaintiff's pleader to see that his client gets a proper decree*, so that he may have the full benefit of the judgment of the Court. If the *pleader neglects that duty*, and in consequence an inadequate decree is passed it is not possible afterwards in execution to remedy that defect." The Italics are ours. With every deference to the opinion of the Honorable Court, we beg to ask, "Was it ascertained beforehand that the pleader was paid for the duty, the neglect of which was the subject of the above remark?" If not, we cannot understand, why the officer who *passed* and signed the decree* and who is paid for by the Government, was not accused of negligence; we cannot also understand why the amlah who is a paid servant of the Government and whose duty it was to *draw up* the decree*, was not charged with negligence; we cannot again understand why the party† in whose favor the decree was passed and who would reap its benefits and *whose interest, therefore, was to see that the decree was properly drawn up*, was not accused of negligence; and lastly we fail to understand how a pleader who, unless paid for, is not supposed to be bound to do anything, could properly be charged with neglect, and that, also, in his absence. We can assert without fear of contradiction that the Mufassal pleaders are not always properly paid for in the cases in which they are retained and that seldom is a fee paid for examining a decree.

We beg to acknowledge with thanks the receipt, from Messrs. Thacker, Spink & Co., Calcutta, of a work entitled "A Critical Essay on the Hindoo Law of Adoption" by a Hindoostani Hindoo Vakeel. The author seems to have spared no pains to make his work a complete,

* S. 205, Civil Procedure Code.
† S. 206, Civil Procedure Code.

and at the same time a handy, manual relating to the law of adoption. It will be found that almost all the interesting decisions of the several High Courts and of the Privy Council from the earliest times down to February 1880, which have any bearing upon the subject, have been quoted and commented upon, and almost all the authors, both English and Native, who are considered authorities in the several schools of law in different parts of India, have been consulted. In many places, original texts in Sanskrit, together with their authoritative translations and Sanskrit annotations, have been quoted. In fact nothing has been omitted to render the book generally acceptable and worthy of public patronage. We do not doubt that the author is a man of great learning and vast researches. We therefore regret that he has not given his name, the mention of which is so peculiarly necessary to make a law-book one of authority. The work has been very neatly got up by Messrs. Thacker, Spink & Co. Its price is Rs. 3 only. We can confidently recommend it to the public as a very useful and interesting work.

The Gazette of India dated the 3rd July 1880, has made the following notification :—Corrigendum.—In Act No. VI. of 1880 (Licensing of Trades and Dealings), published in the Gazette of India, Part IV, of the 6th, 13th and 20th March, 1880, in the marginal note to section 15, *for* "11" read "10".

CALCUTTA HIGH COURT.

THE 23RD JANUARY, 1880.

Before Mr. Justice Wilson.

GOVIND LOLL SEAL and others, *Plaintiffs.*

versus

DEBENDRO NATH MULLICK and others, *Defendants.*

Limitation—Act XV. of 1877, Sched. II., Arts. 139, 142 and 144—Discontinuance of possession—Adverse possession.

Where there has been possession followed by discontinuance of possession, limitation runs from the moment of its discontinuance whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued.

A, the owner of a house, without taking any acknowledgment of his title, allowed B, and after him his representatives, to remain in exclusive occupation of the house for upwards of 30 years free from rent, and after that time brought a suit for ejectment. A retained the title deeds in his possession and paid the rates and taxes. *Held*, that although in

England the relation of the parties might be that of a tenancy-at-will, it was not that of landlord and tenant within the meaning of article 139 of the Limitation Act, XV. of 1877, Schedule II.

In this case the plaintiff sued to recover certain immoveable property in the possession of the defendants.

For the defence it was alleged that the property in question had been given, upwards of 30 years ago, as a gift to Sumboonath Mullick, the father of the male defendants and of the late husband of the female defendant, by the late Mutty Loll Seal, through whom the plaintiff claimed.

It was admitted that upwards of 30 years ago Sumboonath had been in possession and exclusive enjoyment of the property in question, and that from the time of his death the defendants, as his representatives, had continued in possession. Neither Sumboonath nor the defendants had at any time paid, or been asked by Mutty Loll Seal or by any one claiming under him to pay rent, until recently, when it seems that ill feeling had arisen between the two families in consequence of the part taken by some of them in certain litigation. The title deeds, it was shown, had always remained in the possession of the Seals, the rates and taxes had been paid by them and the property stood in the names of the Seals in the books of the Municipality and of the Collector, and in the general register under Act VII. (B. C.) of 1876.

The defendants were unable to prove satisfactorily the actual gift of the house to Sumboonath. It appeared, however, that he, and after him his family, had constantly been in the habit of receiving maintenance from the Seals. The defendants also gave evidence that they had built a *poojah dallan* at their own expense on the premises in question.

Branson and *Phillips*, for the Plaintiffs.

Kennedy and *Henderson*, for the Defendants.

Kennedy contended that the suit was barred by limitation, under Art. 142 of Act XV. of 1877, Sched. II., inasmuch as there had been a discontinuance of possession by the plaintiffs or their ancestor from the time that Sumboonath was permitted to take possession of the house. He referred to *Jack* vs. *Walsh*, 4 Ir. L. R., 254; *Moore* vs. *Doherty*, 5 Ir. L. R., 449; *Ellis* vs. *Crawford*, 5 Ir. L. R, 402.

Branson.—The Article which applies to this case is Art. 144, and the suit is not barred because there was no adverse possession until the plaintiffs had called upon the defendants to give up possession, and they had refused to do so.

The Article relating to discontinuance is intended to meet the cases such as the abandonment of chur lands.

The defendants have been merely in permissive occupation of the house, and no cause of action could have arisen, until we had demanded and been refused possession, or until our title had been denied—*Nund Coomar Banerjee* vs. *Phillip*, 8 W. R., 385.

[WILSON, J.—The present Act nowhere makes the arising of the cause of action the point from which limitation commences to run.]

In a case under Act XIV. of 1859—*Rewat Lall Singh* vs. *Khurrack Dharee Singh*, 12 W. R., 167—MARKBY, *J.*, says:—"The Statute of Limitation never begins to run until there has been a cause of action." (See p. 169.)

If the case does not fall within Art. 144 it comes within Art. 139, for the defendants were merely as tenants-at-will.

The following judgment was delivered by

WILSON, J.:—The plaintiffs in this case were the successors in title to one Mutty Loll Seal who died in 1854, and as such they seek to recover a house, of which the defendants are in possession.

The defendants are the sons and widow of Sumboonath Mullick, who died some 20 years ago.

The house in question was formerly the property of Mutty Loll Seal. Sumboonath Mullick was a friend or dependent of Mutty Loll Seal, and was for many years the object of his bounty. Some thirty years ago, several years before the death of Mutty Loll Seal, Sumboonath entered upon possession of the house, and from that time to the present he, and after him the defendants, have been in exclusive occupation.

So far there is no dispute. Then the case of the plaintiffs is set out in paras. 11 and 12 of the plaint.

"11.—The said Sumboonath Mullick, who had been an old dependent of the plaintiff's father, Mutty Loll Seal, was permitted by the said Mutty Loll Seal to occupy the house and premises No. 69, Chunnumgully, without paying any rent for the same."

"12.—Since the death of the said Sumboonath Mullick, which took place about 20 years ago, the defendants have been permitted up to the time hereinafter stated to reside in the said premises without paying rent for the same."

The case of the defendants is set out in para. 2 of the written statement.

2.—"The said Mutty Loll Seal was an intimate friend of Ram-

ruttun Mullick, the father of the said Sumboonath Mullick, and the latter being in very reduced circumstances, the said Mutty Loll Seal, about thirty years ago, made a gift of the house in the plaint mentioned to him, the said Sumboonath Mullick, and he was in possession during his life, and since his death, about 20 years ago, the defendants have been in possession of the said house by virtue of the said gift."

As to which of these stories is the true one there is no direct evidence, nor could there well be, both parties to the original transactions being long since dead.

The circumstances in favour of the plaintiffs are these:—The title deeds have remained in the possession of the Seals. The rates and taxes have been paid by them, and repairs have from time to time been executed by them (upon this point I accept the evidence of the plaintiff's witnesses). In the books of the Municipality, and in those of the Collector, the house has always stood in the names of some of the Seal's, as also in the general register under Bengal Act XII. of 1876.

Several witnesses also spoke to various conversations and oral admissions. But these I reject as untrustworthy.

The payment of rates and taxes, and the execution of repairs, are at first sight strong indications of ownership. But they lose their force when it is considered that Sumboonath and his family were the objects of the bounty of the Seals, receiving from them for many years a regular allowance for their maintenance. I cannot say that the Seals may not have been just as likely to pay their taxes and repair their house as to provide them with maintenance.

Again the fact of the house standing always, in the books I have referred to, in the names of some of the Seals is at first sight a circumstance of weight. But on closer consideration it loses its force. The plaintiffs' case is, that the house descended to the heirs of Mutty Loll. In the Collector's books throughout, and in the Register under Bengal Act VII. of 1876, the persons entered as owners are the trustees of the late Mutty Loll Seal. The meaning of this expression was not clear till a comparatively late stage of the case. But Mr. Meek, manager of the plaintiffs, when recalled for another purpose, explained it. There was a deed executed by Mutty Loll, by which he settled certain property in trust for his family, and this house is not included in it. Whoever, therefore, caused those entries to be made did so, upon any view of the case, in entire ignorance of the facts, and the entries are as incon-

sistent with the plaintiff's case as with the defendants. I can draw no inference from such entries.

In favour of the defendants are the facts that they and their father and husband have been in exclusive possession for thirty years; that they have paid no rent, and have neither given nor been asked to give any acknowledgment of the plaintiffs' title; and that no claim to expel them was ever made till lately, after ill-feeling had arisen by reason of other litigation in which some of the parties to this suit were concerned; and that some years ago the defendants built a *poojah dalan* in the house at their own expense, though it is sworn, and probably with truth, that some at least of the materials were given by the Seals.

It lies upon the plaintiffs to prove their case, and recover by the strength of their own title. I think they have failed to prove the case they have set up.

I am further of opinion that, even if the plaintiffs had established the case they contend for, their claim would be barred by limitation. The period of limitation and the point from which it is to run in claims for possession of land are dealt with in Articles 134 to 144 (inclusive) of the second schedule to the Limitation Act. The first thing to be observed about these provisions is, that (differing herein from some earlier Acts) the present law in no instance makes the accruing of a cause of action the point from which limitation is to run in claims to possession of land. No doubt in many, probably in most, instances the point adopted as the starting point is in fact coincident with the accruing of the cause of action; but it is not necessarily so. Just as under the English Act 3 & 4 William IV, Chapter 27, limitation may in some cases begin to run before any right of action has arisen—*Owen* vs. *De Beauvoir*, 16 M. and W., 547.

Secondly, it seems clear that the framers of the Act were minded to get rid of the distinction between adverse and non-adverse possession wherever it could be done, wherever any other test could be found. Accordingly it is only in the last Article, No. 144, in cases not otherwise provided for, that the idea of adverse possession is allowed to come in.

Three Articles have been referred to, and I think rightly, as those under some one or other of which the present case must fall—viz, Articles 139, 142 and 144. Article 139 deals with suits by a landlord to recover possession from a tenant, and the limitation runs from "the time when the tenancy is determined." Art. 142 deals with suits for

possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and limitation runs from "the date of the dispossession or discontinuance." Art. 144 deals with suits for possession of immoveable property or any interest therein not hereby otherwise especially provided for; and limitation runs from the time "when the possession of the defendants become adverse to the plaintiff."

The case does not, in my opinion, fall under Article 139. It may be that in England a person in the position in which the plaintiffs allege Sumboonath to have been, might properly be called a tenant-at-will. But the Limitation Act is an Act passed not for the presidency towns, but for British India. And I do not think, assuming the plaintiff's story to be proved, that the relation of the parties would be that of landlord and tenant within the meaning of those words as used in such an Act.

In Art. 142 it appears to me that the Legislature intended to adopt the policy of the English Act, 3 & 4 William IV, c. 27, section 3, from which the language is taken; and I think full effect must be given to the plain meaning of the words used. The meaning seems to me to be this; that where there has been possession followed by discontinuance of possession, time runs from the moment of its discontinuance, whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued. In the present case I think it appears that 30 years ago Mutty Loll Seal was in possession of the premises in dispute, and that he then discontinued possession by putting Sumboonath Mullick in possession.

It was urged that this construction might in some cases work hardly. It may be so. In any case at all analogous to the present I do not think it could. The true owner can always protect himself, either by taking care to establish the relation of landlord and tenant between himself and the person he puts in possession, or by insisting on periodic acknowledgments of his title under section 19 of the Act.

It follows from what I have said that, in my opinion, Article 144 has no application to his case.

On both grounds, therefore—first that the plaintiffs have failed to prove their case; secondly, that if they had, their claim would be barred by limitation—I think the suit must be dismissed with costs.

224. Where a Subordinate Magistrate discharges a person accused of an offence not being an offence specified in the 7th column of the schedule to the Criminal Procedure Code as triable by the Court of Session only, the District Magistrate has no power to direct a retrial under the provisions of sec. 296.—*Reg.* v. *Subhanna bin Ganu.* 9 Bom. H. C. R., 169.

225. The Court of Session can only order the commitment of an accused person in cases exclusively triable by it.—*Queen* v. *Situl Pershad.* 5 N. W. P. 168.

225A. The Court of Session has no power to set aside a commitment made under its direction. If it doubt the legality of the commitment it should make a reference to the High Court. In the Matter of the Petition of *Hasan Raza Khan.* 7 N. W. P. 211.

226. Counsel cannot claim as of right to be heard on a reference to the "High Court" under section 296 of Criminal Procedure Code. *Reg* v. *Devma* and *Somshekhar.* I L. R., 1 Bom. 147.

227. The Appellant after his discharge by the Assistant Magistrate, upon a charge under section 457 of the Indian Penal Code, was committed to the Session's Court by order of the Session Judge, under the Criminal Procedure Code, 1872, section 296 upon charges under sections 380, and 457 of the Penal Code.

Held by the Full Bench (Spankie and Oldfield, J.J. dissenting) that the commitment was illegal, and that "Session Case" within the meaning of section 296 of the Code of Criminal Procedure is a case exclusively triable by the Court of Session.—*Empress* v. *Kanchan Singh.* I. L. R., 1 All. 413.

S. 297.

228. In a case of apprehended breach of peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

Per Markby, J.—Sections 294 and 297, Act X. of 1872, do not debar the High Court from interfering when in cases requiring the exercise of discretion, it appears upon the face of the proceeding that the Magistrate has exercised no discretion at all or has exercised his discretion in a manner wholly unreasonable.

Per Mitter, J.—Under section 297, the High Court has the power of interfering with judgments, sentences, or orders of Courts subordi-

nate to it, if there has been a material error in any judicial proceeding of such Courts, meaning thereby any error, appearing on the face of a judicial proceeding resulting in an unjust order.—In the Matter of *Jaggot Chunder Chakerbutty.* I. L. R., 1 Calc. 110.

229. The High Court has jurisdiction (having regard to ss. 297, and 46, Act X. of 1872) to take cognizance of and revise the proceedings of a Magistrate while they are in an interlocutory state of pending investigation, and may suspend such proceedings without having the record before it, and order bail to be taken from the accused.—20 W. R, Cr., 23.

230. The questions which the High Court has to determine under ss. 2.4 and 297 Act X. of 1872 are questions of law or procedure which affect the decision, and not questions of fact depending upon conflicting evidence which has been considered by the Judge and upon which he has given his opinion adversely to the accused.—20 W. R, Cr., 40, 61. See also 24 W. R., Cr., 60; 25 W. R., Cr., 10, 74.

231. To justify the High Court in setting aside proceedings on trial and conviction, under s. 297, Act X. of 1872, there must be material error,—*i e.*, such an error as has occasioned a failure of justice. (See ss. 283 and 294).—*Queen* v. *Ramkanu.* 12 B. L. R. 253. (Note.)

232. According to ss. 283 and 297 Act X. of 1872, the error to justify the setting aside of a criminal trial on the ground of failure of justice, must be a material error.—19 W. R., Cr., 28. See also 21 W. R, Cr., 43; 24 W. R., Cr., 26, 62.

So also under ss. 294 and 297.—21 W. R., Cr., 88; 25 W. R., Cr., 67.

233. Where the Deputy Magistrate, after hearing two only of the prosecutor's witnesses, though more were present, and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Criminal Procedure Code, and the Magistrate sent the case up to the High Court under s. 296—*held*, that the Court had no power to set aside the acquittal and order a re-trial. The Court can interfere when a prisoner has been improperly discharged, but not when he is improperly acquitted.—*Queen* v. *Hatu Khan*, 12 B. L. R. 22.

234. The High Court is competent, under s. 297, Act X. of 1872, if it considers that the accused was improperly discharged, to order him not only to be tried, but also to be committed for trial; but from the absence of the words "order him to be tried" in s. 296, it would seem

that a Magistrate cannot under that section direct a Subordinate Court to take further evidence in a similar case. —19 W. R., Cr., 56.

235. An order passed by a Magistrate under s. 62 Act XXV. of 1861, is not of the nature of a judicial proceeding and cannot therefore be interfered with by the High Court under s. 404.—(F. B.) 14 W. R., Cr., 46. See 15 W. R., Cr., 56; 17 W. R., Cr., 37; 18 W R., Cr, 22.

So also an order passed under s. 518, Act X. of 1872, which cannot be interfered with by the High Court under s. 297.—20 W. R., Cr., 53; 21 W. R., Cr., 22; 22 W. R., Cr., 52.

But if made without jurisdiction, it may be interfered with under 24 and 25 Vic. c. 104, s. 15.—22 W. R., Cr., 24, 78; 23 W. R., Cr., 34; 24 W. R., Cr., 30. See also 24 W. R., Cr., 26.

236. The High Court interfered, under s. 297 Act X. of 1872, in the case of a prisoner who had not appealed.—19 W. R., Cr., 57.

237. Where a Magistrate could, under s. 46 Act X. of 1872, have re-heard a case himself, a reference to the High Court under s. 297 was considered unnecessary.—20 W. R., Cr., 15.

238. Where a Deputy Magistrate convicted an accused of causing grievous hurt, and the Magistrate considered that the accused ought to have been committed to the Sessions on a charge of culpable homicide, and recommended that the High Court should enhance the sentence which had been passed, the High Court held that it could not deal with the case in the mode suggested, but under s. 297 Act X. of 1872 annulled the conviction by the Deputy Magistrate and directed that the accused should be committed to the Sessions on charges of culpable homicide and grievous hurt.—20 W. R., Cr., 63.

239. The High Court under s. 297 Act X. of 1872 set aside the order of a Magistrate appointing to the jury persons who had been appointed by the opposite party, holding that the error of procedure was a material one and affecting the merits of the case.—21 W. R., Cr., 43.

240. The High Court has power, under s. 297, Act X. of 1872, to annul what is illegal whilst passing a legal sentence (*i. e.* annul the imposition of a daily fine for continuing an obstruction, and leave untouched the imposition of a substantive fine for making it).—25 W. R., Cr., 6.

241. Under s. 297 Act X. of 1872 the High Court ordered a Magistrate to draw up a charge and try an accused whom he had improperly discharged.—25 W. R., Cr., 35.

242. An appeal having been preferred to the High Court against a judgment of acquittal of the Court of Sessions, the persons who had

been acquitted were arrested by the Police, and brought before the Magistrate, who illegally directed that they should be detained in custody, pending the decision of the appeal.

Turner, C. J., Officiating, and Pearson, J. were of opinion that the High Court had no power, as a Court of Revision, to interfere with the order. Spankie and Oldfield, J.J., *contra.*—*Queen* v. *Golam Ismael.*—I. L. R., 1 All. 1.

243. Where there is evidence to be considered and weighed by the Court which is called upon to determine whether a person charged with an offence is guilty or not guilty, an error as to the probative force and effect of the evidence is one of fact and not open to correction except on appeal in the case of a conviction.—5 Mad. H. C. R. 10.

244. In a case referred by a District Magistrate, under sec. 434 of the old Criminal Procedure Code, (Sec. 296, New Code,) on the ground that the sentence was illegal: because the charge should have been under Sec. 324 of the Penal Code, for causing hurt by means of a heated substance an offence which the second class Subordinate Magistrate had no jurisdiction to try; and not under Sec. 323 for causing hurt, of which offence the accused had been convicted.

The Court passed no order, as it did not think it right, under the circumstances of the case, to direct the re-trial of the accused on the proper charge.—*Reg.* v. *Amba Kom Girsoji.* 4 Bom. H. C. R. 1.

245 In a case referred by a District Magistrate, under Sec. 434 of the old Code (Sec. 296 of the New Code), on the ground that the charge should have been under Sec. 324 of the Penal Code—an offence not within the cognisance of a second class Subordinate Magistrate; and not under Sec. 323, the Court passed no order.—*Reg.* v. *Nabaji valad Vithoji.* 4 Bom. H. C. R. 2.

246. The High Court, as a Court of Revision, cannot interfere with the findings of the Lower Appellate Court on questions as to the truth of the allegations contained in a libel or the *bonâ fides* of the accused, but upon such questions are bound by the findings of the lower Court.—*Reg.* v. *Kikabhai Parbhudas.* 9 Bom. H. C. R. 451.

247. A was tried and convicted by a Magistrate who relied on evidence which was not relevant, &c. In an application to exercise the powers of review under Section 297, it was held that the expression "material error" in Section 297 of the Code of Criminal Procedure does not include error in appreciating evidence, and the High Court which as a

Court of Revision, is as much bound as a Court of appeal, by the provisions of section 300, will not be justified in rectifying an error merely in the appreciating of evidence, nor even an error in law, unless it be shown to the Court that such error has caused a failure of justice.—*Reg.* v. *Sakharam Manohar.* 11 Bom. H. C. R. 125.

248. A Court of Session has power to direct a Magistrate to enquire into a complaint dismissed by him under Section 147.—7 Mad. H. C. R. 16.

S. 307.

249. The words *Magistrate of the District* in Section 307 apply only to the Magistrate of the particular District in which the Court which imposes the fine sits.—3 Mad. H. C. R. 29.

250. This Section only provides for the distress and sale of moveable property, and (notwithstanding Sec. 70 of the Indian Penal Code) there is no way in which immoveable property can be made liable.—*Reg.* v. *Lalla Karwar.* 5 Bom. H. C. R. 63.

S. 308.

251. The expression "taken into account" in s. 308 Act. X. of 1872 means that the compensation awarded is to be taken into consideration by the Court in a subsequent civil suit, and not that it is to be afterwards deducted from the damages awarded.—22 W. R., Cr., 336.

252. Where loss is occasioned to a person whose property has been stolen, it is not illegal for the trying Magistrate to award portion of the fine inflicted on the accused, as amends, to the owner of such property, although the stolen property is received and restored to the owner.—*Reg.* v. *Yessappa bin Ningappa.* 5 Bom. H. C. R 41.

253. A Magistrate under this section should not make an order awarding compensation to the complainant out of a fine inflicted for causing hurt without some evidence on the record to show that "loss" was caused, or that "any special damage of a pecuniary nature resulted," to the complainant by the offence.—*Reg.* v. *Samsen Babaji.* 3 Bom. H. C. R. 43.

254. Where a person convicted of stealing a horse was sentenced to imprisonment and fine, and the Magistrate, relying on s. 418 Act X. of 1872 and the rule of English law protecting a *bonâ fide* purchaser in market overt, directed the horse to be restored to such a purchaser and the fine to be paid to the complainant, so much of the order, as directed

payment of the fine to complainant was set aside as not warranted by s. 418, as such an order could only be made under s. 308.—20 W. R., Cr., 38.

255. First defendant was indicted for cattle theft and second defendant to whom the cattle had been sold for receiving stolen property. The 2nd defendant was discharged as there was no proof of guilty knowledge, but the Magistrate ordered the return of part of the sale proceeds found on 1st defendant to 2nd defendant—*Held*, that the order was illegal as even if a fine had been imposed on the 1st defendant compensation could not have been given to 2nd defendant, his loss not being the result of the theft.—4 Mad. H. C. R. 28.

256. The accused were convicted of theft of some bullocks and fined. The Magistrate directed that the fines, if collected, should be paid to the 6th witness as compensation for having to return the bullocks which he had purchased to the complainant—*Held*, that this order was bad. The sale to the 6th witness was not the offence complained of within the meaning of the Section.—7 Mad. H. C. R., 13.

S. 309.

257. Section 309 of the Criminal Procedure Code does not extend the period of imprisonment which may be awarded by a Magistrate under Section 65 of the Indian Penal Code, it only regulates the proceedings of Magistrate whose powers are limited. *Contrast*, *Reg* v. *Muhammad Saib*. I. L. R., 1 Mad. 277.—*The Empress af India* v. *Durba*. I. L. R., 1 All. 461.

258. S. 309 of the Criminal Procedure Code makes applicable the provisions of Sec. 65 of the Indian Penal Code not only to offences falling under that Code as defined in its 40th Section, but to every case in which a Magistrate has jurisdiction.—*Reg*. v. *Vithoba bin Soma*. 5 Bom. H. C. R. 61.

S. 310.

259. A sentence of flogging cannot be carried out after the expiry of the limit of 15 days from date of sentence.—6 Mad. H. C. R. 38; 7 Mad. H. C. R 30.

260. A sentence of whipping in addition to imprisonment was held, under s. 310 Act X. of 1872, to have become inoperative by lapse of time.—20 W. R., Cr., 72.

S. 312.

261. The meaning of the words *execution shall be stayed* is that the staying shall be final.—3 Mad. H. C. R. 1.

S. 314.

262. A Magistrate can in no case pass a sentence exceeding twice the amount of punishment which by his ordinary jurisdiction he is competent to inflict.—5 Mad. H. C. R. 42.

263. Where prisoners are convicted of separate offences, a separate sentence should be passed in each case with a direction that the imprisonment in the second case should commence on the expiration of that in the first and so on.—4 Mad. H. C. R. 27.

264. When a person is convicted at one time of two or more offences punishable under the Penal Code, the Court is empowered to sentence the prisoner in the one case to rigorous imprisonment and in the other case to whipping under Act VI. of 1864.—5 Mad. H. C. R. 18.

265. The aggregate of the sentences passed under Section 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal.—*Reg.* v. *Rama Bhivgawda.* I. L. R., 1 Bom. 223.

266. Where a Court convicts a prisoner of forgery and other offences it cannot sentence him to an aggregate amount of punishment; but specify the several penalties awarded for each offence. It is an irregularity on the part of the Court not to pass a separate sentence under each independent head of the charges; it is not however an error or defect in consequence of which the High Court could reverse or alter the sentence under Sec. 283.—*Reg.* v. *Vinayak Trimbak* and another. 2 Bom. H. C R. 414.

267. *Held* that where a person though charged under different sections of the Penal Code, was convicted of what was substantially but a single offence, it was not lawful for the Magistrate who tried him to pass a sentence of imprisonment, as for separate offences, under Sec. 314 of the Code of Criminal Procedure, exceeding in the aggregate the punishment which it was competent for the Court to inflict on conviction of a single offence; and that, as the prisoner had already been several times convicted of similar offences, the Magistrate should have committed him to the Court of Session, with a view to his being punished under Sec. 75 of the Indian Penal Code.—*Reg* v. *Ganu Ladu.* 2 Bom. H. C. R., 132.

S. 317.

268. When there is no provision in a sentence for imprisonment to take effect at the expiration of imprisonment previously awarded, the

subsequent sentence will run concurrently with the former sentence.—5 Mad. H. C. R. 42.

269 In a case of several offences under one section of the Penal Code, the proper way is to try the accused under separate charges for each of the several distinct offences under the section which have been clearly proved against them, and to pass a separate sentence on each conviction with a direction (under s 317 Act X. of 1872) that each should take effect on the expiry of the next prior sentence.—20 W. R., Cr., 70.

S. 327.

270. A commitment was declared illegal on the ground that, though it was practicable to procure the attendance of the witnesses against the accused after his arrest, they were not procured and examined in his presence as required by s 327 Act X. of 1872.—22 W. R., Cr., 33.

271. S. 327 Act X. of 1872, which permits the deposition of a witness to be taken in the absence of an absconding offender, does not apply to a deposition taken before that Act was passed.—21 W. R., Cr 12.

272. Where s. 327 applies it should be shown that, when the former deposition was taken, the accused had absconded, and after due pursuit could not be arrested.—21 W. R., Cr., 12.

S. 328.

273. S. 328 Act X of 1872, which allows a Magistrate to decide a case on the evidence partly recorded by his predecessor and partly by himself, only applies when the Magistrate, after hearing part of the evidence in a case, ceases to exercise jurisdiction and is succeeded by another who has and who exercises jurisdiction in such case, and so s. 329 only applies when the Magistrate is unable to complete the enquiry himself. When, however, a case under trial is removed under s. 47, the whole proceedings must commence *de novo* as provided by s. 45.—24 W. R., Cr., 53.

S. 329.

274. *See* No. 273.

S. 334.

275. In a case of land dispute commenced under the old Criminal Procedure Code, the evidence must be recorded in the manner provided for by s. 334 et seq. Act X. of 1872.—20 W. R., Cr., 14.

S. 335.

276. Cases of maintenance under s. 536 Act X. of 1872 are not in the nature of summary trials, but require the usual procedure laid down for summons cases and the recording of the evidence in full as required by s. 335.—24 W. R., Cr., 61.

ACT XI. OF 1880.

THE BURMA COURTS' ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 2nd July* 1880.]

THIS Act provides for the temporary appointment, from time to time, of an Additional Recorder of Rangoon, and removes certain doubts as to the jurisdiction of the Recorder of Rangoon. It contains 6 sections.—ED., *L. C.*

ACT XII. OF 1880.

THE KAZIS' ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 9th July* 1880.]

AN ACT FOR THE APPOINTMENT OF PERSONS TO THE OFFICE OF KAZI.

WHEREAS by the preamble to Act No. XI of 1864 (*An Act to repeal the law relating to the offices of Hindú and Muhammadan Law Officers and to the offices of Kází-ul-Kuzáat and of Kází, and to abolish the former offices*) it was (among other things) declared that it was inexpedient that the appointment of the Kazi-ul-Kuzaat, or of City, Town or Pargana Kazis should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed; and whereas by the usage of the Muhammadan community in some parts of British India the presence of Kázis appointed by the Government is required at the celebration of marriages and the performance of certain other rites and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of Kazi; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Kazis' Act, 1880";

Commencement.

and it shall come into force at once.

Local extent.

It extends, in the first instance, only to the territories administered by the Governor of Fort St. George in Council. But any other Local Government may, from time to time, by notification in the official Gazette, extend it to the whole or any part of the territories under its administration.

2. Whenever it appears to the Local Government that any considerable number of the Muhammadans resident in any local area desire that one or more Kázís should be appointed for such local area, the Local Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area.

Power to Government to appoint Kázís for any local area.

If any question arises whether any person has been rightly appointed Kazi under this section, the decision thereof by the Local Government shall be conclusive.

The Local Government may, if it thinks fit, suspend or remove any Kazi appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the Local Government unfit, or personally incapable, to discharge the duties of the office.

3. Any Kazi appointed under this Act may appoint one or more persons as his naib or naibs to act in his place in all or any of the matters appertaining to his office throughout the whole or in any portion of the local area for which he is appointed, and may suspend or remove any naib so appointed.

Naib Kazis.

When any Kazi is suspended or removed under section two, his naib or naibs (if any) shall be deemed to be suspended or removed, as the case may be.

4. Nothing herein contained, and no appointment made hereunder, shall be deemed—

(*a*) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder; or

Nothing in Act to confer judicial or other powers on Kazi; or

(*b*) to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or

to render the presence of a Kazi necessary; or

(*c*) to prevent any person discharging any of the functions of a Kazi.

to prevent any one acting as Kazi.

Note.

This Act provides for the appointment of a Kazi by the Government for those who choose to avail themselves of his services; those, however, who would prefer to employ any other so-called Kazi being at liberty to do so.—ED., *L. C.*

ACT XIII. OF 1880.

THE VACCINATION ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 9th July* 1880.]

AN ACT TO GIVE POWER TO PROHIBIT INOCULATION, AND TO MAKE THE VACCINATION OF CHILDREN COMPULSORY, IN CERTAIN MUNICIPALITIES AND CANTONMENTS.

Preamble.

WHEREAS it is expedient to give power to prohibit inoculation, and make the vaccination of children compulsory, in certain municipalities and cantonments; It is hereby enacted as follows :—

Short title.

1. This Act may be called "The Vaccination Act, 1880": and

Application.

it shall apply only to such municipalities and cantonments situate in the territories administered respectively by the Lieutenant-Governors of the North-Western Provinces and the Panjab, and the Chief Commissioners of Oudh, the Central Provinces, British Burma, Assam, Ajmer and Coorg as it may be extended to in manner hereinafter provided.

Interpretation-clause.

2. In this Act, unless there is something repugnant in the subject or context,—

"Municipal Commissoiners":

(1) the expression "Municipal Commissioners" means a body of Municipal Commissioners or a Municipal Committee constituted under the provisions of any enactment for the time being in force :

"parent":

(2) "parent" means the father of a legitimate child and the mother of an illegitimate child :

"guardian":

(3) "guardian" includes any person who has accepted or assumed the care or custody of any child :

"unprotected child":

(4) "unprotected child" means a child who has not been protected from small-pox by having had that disease either naturally or by inoculation, or by having been successfully vaccinated, and who has not been certified under this Act to be insusceptible to vaccination;

"inoculation":

(5) "inoculation" means any operation performed with the object of producing the disease of small-pox in any person by means of variolous matter:

"vaccination-circle":

(6) "vaccination-circle" means one of the parts into which a municipality or cantonment has been divided under this Act for the performance of vaccination:

"vaccinator":

(7) "vaccinator" means any vaccinator appointed under this Act to perform the operation of vaccination, or any private person authorized by the Local Government in manner hereinafter provided to perform the same operation; and includes a "Superintendent of vaccination":

"Vaccination-season":

(8) "vaccination-season" means the period from time to time fixed by the Local Government for any local area under its administration by notification in the official Gazette, during which alone vaccination may be performed under this Act.

Extension of Act to municipalities.

3. A majority in number of the persons present at a meeting of the Municipal Commissioners specially convened in this behalf may apply to the Local Government to extend this Act to the whole or any part of a municipality, and thereupon the Local Government may, if it thinks fit, by notification published in the official Gazette, declare its intention to extend this Act in the manner proposed.

Any inhabitant of such municipality or part thereof who objects to such extension may, within six weeks from the date of such publication, send his objection in writing to the Secretary to the Local Government, and the Local Government shall take such objection into consideration. When six weeks from the said publication have expired, the Local Government, if no such objections have been sent as aforesaid, or (when such objections have been so sent) if in its opinion they are insufficient, may by like notification effect the proposed extension.

Extension to cantonments.

4. The Local Government may, with the previous sanction of the Governor General in Council, by notification in the local official Gazette, extend this Act to the whole or any part of a military cantonment.

Power to withdraw local area from operation of Act.

5. The Local Government may, by notification in the official Gazette, withdraw any local area in a municipality, or with the previous sanction of the Governor

General in Council, any local area in a cantonment, from the operation of this Act.

Prohibition of inoculation.

6. In any local area to which the provisions of this Act apply, inoculation shall be prohibited; and no person who has undergone inoculation shall enter such area before the lapse of forty days from the date of the operation, without a certificate from a medical practitioner, of such class as the Local Government may from time to time by written order authorize to grant such certificates, stating that such person is no longer likely to produce small-pox by contact or near approach.

Inoculated persons not to enter, without certificate, local area subject to Act.

Vaccination-circles.

7. Every local area to which this Act applies shall be a vaccination-circle, or shall in manner hereinafter provided be divided into a number of such circles;

Vaccinators;

one or more vaccinators shall be appointed in manner hereinafter provided for each such circle; and

Superintendent of vaccination.

one or more Superintendents of vaccination shall be appointed in manner hereinafter provided for each such local area.

Private vaccinators.

8. The Local Government may by written license authorize private vaccinators to perform vaccination in any vaccination-circle, and may suspend or cancel any such license.

Unprotected children to be vaccinated.

9. When any unprotected child, having attained the age of six months, has resided for a period of one month during the vaccination-season in any local area to which the provisions of this Act apply, and has not at the expiration of such period attained the age, if a boy, of fourteen years, and if a girl, of eight years, the parent or guardian of such child shall take it, or cause it to be taken, to a vaccinator to be vaccinated, or send for a vaccinator to vaccinate it.

Vaccinator to vaccinate children, or deliver certificates of postponement.

Such vaccinator shall vaccinate the child and deliver to its parent or guardian a memorandum stating the date on which the vaccination has been performed and the date on which the child is to be inspected in order to ascertain the result of the operation, or shall, if he finds such child in a state unfit for vaccination, deliver to its parent or guardian a certificate under his hand to the effect that the child is in a state unfit for vaccination for the whole or part of the current vaccination-season.

10. The parent or guardian of every child which has been vaccinated under section nine shall, on the date of inspection stated in the memorandum, take the child, or cause it to be taken, to a vaccinator for inspection, or get it inspected at his own house by a vaccinator; and such vaccinator shall then append to the memorandum a certificate stating that the child has been inspected and the result of such inspection.

Inspection after vaccination.

11. When it is ascertained at the time of inspecting a child under section ten that the vaccination has been successful, a certificate shall be delivered by the vaccinator to the parent or guardian of such child to that effect, and such child shall thereafter be deemed to be protected.

Procedure when vaccination is successful.

12. When it is ascertained as aforesaid that the vaccination has been unsuccessful, the parent or guardian shall, if the vaccinator so direct, cause the child to be forthwith again vaccinated and subsequently inspected in manner hereinbefore provided.

Procedure when vaccination is unsuccessful.

13. A certificate granted under section nine showing the unfitness of a child for vaccination shall remain in force for the period stated therein, and on the termination of that period, or, if that period terminates after the vaccination-season is over, when the next vaccination-season begins, the parent or guardian of such child shall take the child, or cause it to be taken, to a vaccinator to be vaccinated, or procure its vaccination at his own house by a vaccinator:

Procedure when child is unfit for vaccination.

Provided that if the child is still found to be in a state unfit for vaccination, the certificate granted under section nine shall be renewed.

Renewal of postponement certificates.

14. If the Superintendent of vaccination is of opinion that a child which has been three times unsuccessfully vaccinated is insusceptible of successful vaccination, he shall deliver to the parent or guardian of such child a certificate under his hand to that effect; and the parent or guardian shall thenceforth not be required to cause the child to be vaccinated.

Certificates of insusceptibility of successful vaccination.

15. The vaccination of a child shall ordinarily be performed with such lymph as may be prescribed by the rules to be made under this Act:

What lymph to be used.

Provided that

1st, if animal-lymph is so prescribed and the parent or guardian of any child desires that such child shall be vaccinated with human lymph, it shall be so vaccinated; and

2nd, if in any local area in which animal-lymph is procurable human lymph is so prescribed, and the parent or guardian of any child desires that such child should be vaccinated with animal-lymph, and tenders to the vaccinator the amount of such fee, not exceeding one rupee, as may be fixed by such rules in this behalf, such child shall be so vaccinated.

No fee to be charged except by private vaccinator.

16. No fee shall be charged by any vaccinator except a private vaccinator to the parent or guardian of any child for any of the duties imposed on such vaccinator by or under the provisions of this Act:

Proviso.

Provided that it shall be lawful for a vaccinator to accept a fee for vaccinating a child by request of the parent or guardian elsewhere than in the circle for which such vaccinator is appointed.

Duties of Superintendent of vaccination.

17. The Superintendent of vaccination, in addition to the other duties imposed on him by or under the provisions of this Act, shall ascertain whether all unprotected children, under the age of fourteen years if boys, and under the age of eight years if girls, within the local area under his superintendence have been vaccinated; and, if he has reason to believe that the parent or guardian of any such child is bound by the provisions hereinbefore contained to procure the vaccination of such child or to present it for inspection, and has omitted so to do, he shall personally go to the house of such parent or guardian, and there make enquiry, and shall, if the fact is proved, forthwith deliver to such parent or guardian, or cause to be affixed to his house, a notice requiring that the child be vaccinated, or (as the case may be) that it be presented for inspection, at a time and place to be specified in such notice.

Notice to parent or guardian neglecting to comply with Act.

Order by Magistrate when notice not complied with.

18. If such notice is not complied with, the Superintendent of vaccination shall report the matter to the Magistrate of the District, or such Magistrate as the Local Government or the Magistrate of the District may from time to time appoint in this behalf; and the Magistrate receiving such report shall summon the parent or guardian of the child and demand his explanation, and shall, if such explanation is not

satisfactory, make an order in writing directing such parent or guardian to comply with the notice before a date specified in the order.

Procedure when order not obeyed.

If on such date the order has not been obeyed, the Magistrate shall summon the parent or guardian before him, and, unless just cause or excuse is shown, shall deal with the disobedience as an offence punishable under section twenty-two.

Magistrates to be non-official natives.

The Magistrates appointed under this section shall, as far as is conveniently practicable, be natives of India, and not paid servants of the Government.

Power to make rules for municipalities.

19. When this Act has been applied to any municipality or any part thereof, the Municipal Commissioners may, from time to time, make rules consistent with this Act for the proper enforcement of this Act within the limits to which it applies. Such rules shall be made in the manner in which, under the law for the time being in force, the Commissioners make rules or bye-laws for the regulation of other matters within the limits of the municipality, and shall, when confirmed by the Local Government and published in the official Gazette, have the force of law:

Provided that the Local Government may at any time rescind or modify any such rule.

Power to make rules for cantonments.

20. When this Act has been applied to any cantonment or any part thereof, the Local Government may, from time to time, subject to the control of the Governor General in Council, make such rules.

What rules under sections 19 and 20 may provide for.

21. The rules to be made for any local area under sections nineteen or twenty may, among other matters, provide for—

(a) the division of such local area into circles for the performance of vaccination;

(b) the appointment of a place in each vaccination-circle as a public vaccine-station, and the posting of some distinguishing mark in a conspicuous place near such station;

(c) the qualifications to be required of public vaccinators and Superintendents of vaccination;

(d) the authority with which their appointment, suspension and dismissal shall rest;

(e) the time of attendance of public vaccinators at the vaccine-stations, and their residence within the limits of the vaccination-circles;

(f) the distinguishing mark or badge to be worn by them ;

(g) the amount of fee chargeable by private vaccinators, and their guidance generally in the performance of their duties ;

(h) the facilities to be afforded to people for procuring the vaccination of their children at their own houses ;

(i) the grant and form of certificates of successful vaccination, of unfitness for vaccination or of insusceptibility of vaccination ;

(j) the nature of the lymph to be used and the supply of a sufficient quantity of such lymph ;

(k) the fee to be paid for vaccination with animal-lymph under section fifteen ;

(l) the fee to be paid to a public vaccinator for vaccinating a child beyond the vaccination-circle at the request of the parent or guardian of the said child ;

(m) the preparation and keeping of registers showing—

the names of children born in such local area on or after the date of the application of this Act ;

the names of unprotected children born in such local area previous to the application of this Act, and who are, at the time this Act is applied, under the age of fourteen years if boys, and of eight years if girls ;

the names of unprotected boys and girls respectively under those ages brought within such local area at any time after the application of this Act and who have resided there for a month ;

the result of each vaccination or its postponement, and the delivery of certificates, if any ;

(n) the assistance to be given by the Municipal Commissioners and municipal servants in the preparation of these registers, and in other matters ; and

(o) the preparation of vaccination-reports and returns.

Punishment of offences.

22. Whoever commits any of the undermentioned offences (that is to say) :—

(a) violates the provisions of section six,

(b) neglects without just excuse to obey an order made under section eighteen,

(c) breaks any of the rules made under section nineteen or twenty, or

(d) neglects without just cause to obey an order made under section eighteen after having been previously convicted of so neglecting to obey a similar order made in respect of the same child,

shall be punished as follows (that is to say) :—

in the case of the offence mentioned in clause (*a*), with simple imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both ;

in the case of the offences mentioned in clauses (*b*) and (*c*), with fine which may extend to fifty rupees ; and

in the case of the offence mentioned in clause (*d*), with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Municipal funds to receive fines and meet expenditure.

23. The amount of all fees and fines realized, and the amount of all expenditure incurred, under this Act in any municipality shall respectively be credited to and paid from the municipal fund.

refer the parties to the Civil Court for the determination of their respective interests in the income or other benefit, which the executive will, however, still, as against either or both of the litigants, be at liberty to allow or withhold. Lands held free of assessment under a grant from Government, which bestows on the grantee the lands themselves and not merely the Government revenue arising from them, do not fall within the provisions of the Pensions Act.—*Bábaji Hari* v. *Rajaram Ballal.* 1 Bom. 75.

110. —— XXV. of 1871, s. 2—*See No.* 551.

111. —— I. of 1872, ss. 25, 26 & 167—*Admissibility in evidence of Confession—Police Officer also a Magistrate—Deputy Commissioner of Police in Calcutta—Letters Patent,* 1865, *s.* 26—*Case certified by Advocate General.*] The prisoner, on his arrest, made a statement in the nature of a confession, which was reduced into writing by one of the Inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police office, the Deputy Commissioner receiving and attesting the statement in his capacity of Magistrate and Justice of the Peace. At the trial of the prisoner at the Criminal Sessions of the High Court, this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner that, under s. 25 of the Evidence Act, it was inadmissible. On a case certified by the Advocate General under cl. 26 of the Letters Patent, *held,* that the confession was, under s. 25 of the Evidence Act, not admissible in evidence.

Per Garth, C. J.—S. 26 of the Evidence Act is not to be read as qualifying the plain meaning of s. 25. In construing s. 25 the term "police officer" is not to be read in a technical sense, but in its more comprehensive and popular meaning.

Per Curiam.—S. 167 of the Evidence Act applies as well to Criminal as to Civil cases.

Per Garth, C. J. (Pontifex, J., doubting.)—The Court which under that section is to decide upon the sufficiency of the evidence to support the conviction is, in a case coming before the Court under s. 26 of the Letters Patent, the Court of review, not the Court below. Such decision is to be come to on being informed by the Judge's notes, and, if necessary, by the Judge himself, of the evidence adduced at the trial.

Per Curiam—Apart from s. 167, the Court has power in a case

under cl. 26 of the Letters Patent, to review the whole case on the merits, and affirm or quash the conviction.—*The Queen* v. *Hurribole Chunder Ghose.* 1 Calc. 207.

112. ——— s. 108—*See No* 229.

113. ——— s. 110—*See No.* 231.

114. —— IX. of 1872, s. 27—*See No.* 569.

115. ——— s. 28—*Agreement to refer to arbitration—Suit for damages for breach of contract—Suit for specific performance of contract to refer.*] A contract entered into between the plaintiffs and the defendants contained a clause that " in case of any dispute the same to be decided by two competent London brokers—one to be appointed by the buyers' and the other by the sellers' agents; such brokers' decision to be final," but did not provide that no action should be brought till such decision was pronounced. Matter of dispute arising, the defendants refused to appoint an arbitrator. In a suit for damages for breach of the contract, *held*, that the contract was not one of the nature referred to in s. 28 Act IX of 1872. That section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of Law. The first exception in that section applies only to a class of contracts where the parties have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators.

Semble.—A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to s. 28 of Act IX of 1872.—*The Coringa Oil Company, Limited* v. *Koegler.* 1 Calc. 466.

116. —— Exception 1.—*Agreement to refer to arbitration, revocation of—Common Law Procedure Act of* 1854 (17 *&* 18 *Vict*, c. 125)—9 *&* 10 *Will. III*, c. 15—3 *&* 4 *Will. IV.*, c. 42—*Specific performance of agreement to refer—Suit for damages for breach of agreement to refer.*] A contract entered into by the plaintiffs with the defendants contained a clause providing, in case of any dispute, for a reference to two arbitrators in England, one to be appointed by each of the contracting parties, whose decision in the matter was to be final. The contract contained no provision for making the submission to arbitration a rule of Court, so that 9 & 10 Will. III, c. 15, and 3 & 4 Will. IV, c. 42, s. 39 did not apply. Matter of dispute arising, the defendants refused to appoint an arbitrator, and an award was made by arbitrators appointed by the plaintiffs. Previous to the making of the award the plaintiffs, under the

provisions of the Common Law Procedure Act, 1854, had the submission to arbitration made a rule of the Court of Common pleas. In a suit in which the plaintiffs' claim was for damages awarded by the arbitrators and incurred by the plaintiffs in respect of the breach of the contract, *held*, that the award was invalid. The making the submission a rule of Court has not the effect of depriving a party of his right to revoke, at any time before the award, the authority of arbitrators whom he has appointed : still less could it have any effect to prevent him from declining to appoint an arbitrator.

Held also, that the contract was not within the scope of s. 28, Act IX of 1872. To make an agreement conform to Exception 1 of that section, the jurisdiction of the Courts must be excluded in all respects except the matter which is the result of the arbitrators' award.

Agreements which exclude the jurisdiction of the Courts until an award is made, as in *Scott* v. *Avery* (2 Jur. N. S., 815 ; 5 H. L. C 811) are within that Exception, and are not illegal.

Quære.—Whether it was intended by that exception to authorize the Court to entertain a suit for specific performance of an agreement to refer to arbitration ?

S. 28, Act IX. of 1872, does not forbid an action for damages for the breach of such an agreement.—*Koegler* v. *The Coringa Oil Company.* 1 Calc. 42.

117. ——— s. 72—*See No.* 267.

118. —— X of 1872, ss. 4, 297—*See No.* 364.

119. ——— s. 18—*See No.* 595 (*b*.)

120. ———s. 64—*Power of Judge acting in English department.*] An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English department of the High Court, but before the Court in its Judicial capacity, and should be supported by affidavits or affirmation in the usual way.—*The Queen* v. *Zuhiruddin.* 1 Calc. 219.

121. ——— s. 67.—*Jurisdiction—Dacoity in the Gayakwad's territory—Trial in British territory.*] Where dacoity was committed at Velanpor, a village in the territory of H. H. the Gayakwad, and a part of the stolen property found where it had been concealed by the accused in British territory, it was

Held, that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated at Velanpor, al-

though, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might in the legal sense have coalesced with the first and principal one, so as to give jurisdiction under s. 67 of the Code of Criminal Procedure in each district into which the property was conveyed. But, on a conviction of retaining stolen property, the sentences awarded could, it was held, be sustained, the retaining having taken place in British territory.—*The Queen* v. *Lukhya Govind.* 1 Bom. 50.

122. ——— s. 122—*See No.* 262.

123. ——— s. 209—*Award of compensation—Complainant.*] A *karkun* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused, and ordered the *karkun* to pay the accused compensation under s. 209 of the Criminal Procedure Code.

Held, that such last-mentioned order was wrong, the *karkun* not being a complainant within the meaning of s. 209 of the Code of Criminal Procedure.

In such a case as the above the Subordinate Judge should be regarded as the complainant, and he, having acted judicially, was not liable to the penalty provided in s. 209 of the Criminal Procedure Code.—*In re Keshav Lakshman.* 1 Bom. 175.

124. ——— s. 210—*See No.* 257.

125. ——— s. 215—*See No.* 256.

126. ——— s. 220—*See No.* 595 (*a*).

127. ——— s. 263—*See No.* 429.

128. ——— s. 272—*Arrest pending appeal.*] In an appeal under s. 272 of Act X of 1872, the High Court has power to order the accused to be arrested pending the appeal.—*The Queen* v. *Gobin Tewari.* 1 Calc. 281.

129. ——— s. 280—*Enhancement of punishment by Appellate Court.*] S. 280 of the Code of Criminal Procedure authorizes an Appellate Court, subject to the proviso in the final sentence, to enhance any punishment that has been awarded. As an Appellate Court, 1st Class Magistrate has power to pass any sentence which Subordinate Magistrate might have passed.—*Proceedings, 22nd February* 1876, (H. C. Madras.) 1 Mad. 54.

toms over a wider and wider field appeals to the Government to effect the same objects by legislation. The spirit of the community at large spreads by gradual infiltration through the mass of local peculiarities and subdues them to itself. Change of dwelling-place and sale of land become more frequent; and the necessity is felt of rules for the holding of property and for all common transactions which will best express the average general convictions as to what is beneficial and convenient.

23. By opponents of scientific uniformity in legislation for India we are often reminded of the extremely different social conditions and stages of progress attained in different parts of the country. That very great differences exist is undoubted; but it is in no way conclusive of the question of systematic, as opposed to casual, law-making. Looking at the matter by the light of history, we have to admit that the contrasts in civilization amongst the several provinces of the Roman Empire were not less marked than those to be observed in British India. Yet this was not allowed to prevent the growth and application of a uniform system of legal principles. The prætorian law, in fact, gained largely by its necessary adaptation to the needs of citizens and foreigners alike, and its consequent rejection of all that was specially local and peculiar. Principles of universal application according to the standards then recognized had to be sought out, because it was felt that what was a good reason for a rule to a Roman was sometimes no reason at all to a foreigner, or even to a provincial. It was in this way that the Civil Law gained that character of generality which has given it such an ascendancy on the Continent of Europe. In India analogous conditions must lead to not wholly unlike results. The law to be introduced, or framed out of existing local materials, has always to be tried by the test of its suitability to the varying circumstances of the different provinces. What is insular or cramped either in thought or in expression is thus almost certainly eliminated. The central ideas of the English law are, in such works as the Penal Code and the Contract Act, cleared from the remnants of a lower stage of organization with which, in the English books, and in the English Courts, they are still encumbered, and presented in a simplicity and generality of expression which has re-acted very perceptibly on the ideas of lawyers in England. The more searching analysis forced by his situation on the Indian lawyer and legislator may thus in the end prove highly beneficial both to the science af law, and to its practical application.

24. Still, exceptions must undoubtedly be made in many cases in

which it can be seen that what is special and local cannot be made immediately to yield to what is general without a diminution of the people's happiness. In such cases the question occurs, "Le mal de changer est-il toujours moins grand que le mal de souffrir ?"* and it must receive a reasonable and considerate answer. But even the most backward districts are by degrees drawn within the general circulation of thought and activity. Their people become stamped with much the same intellectual marks as their neighbours. Transactions between them increase in frequency. After a time familiarity and habit have made a removal of anomalies welcome; and in this way a well-ordered uniformity subdues tract after tract by a perfectly natural process. It is quite possible, indeed, that, in the future, provinces which had few or no definite legal ideas of their own may become, like Gaul in ancient days, remarkable for the completeness and tenacity of their adhesion to the new system. In the meantime, the existence of necessary exceptions in particular districts is no more a reason against a systematic Code in other parts of India, than the operation in Scotland or the Channel Islands of their own laws is a reason against a scientific recension of the law of England.

25. It is not, however, necessary or desirable that a Code, taking it in even its narrower sense of an aggregate of the rules in a particular department of the law, should include chapters or separate statutes on every branch and subjection of the whole subject. As to some of these a change of circumstances, such as the discovery of an entirely new means of utilizing property, the growth or decline of population, or a rapid variation in people's conceptions and sentiments, may make it desirable to await the natural evolution of the new order of ideas. Custom itself in such cases undergoes a silent metamorphosis, which undue urgency would arrest, as it would call in alarm and prejudice to the support of established use and wont, and make reform possible only at the cost of dissatisfaction and resentment. In other cases wholly new institutions, such as railways or Government currency-notes, have to find by tentative adjustments their proper place amongst those already existing. Special and temporary legislation, and that only, is properly applicable in such instances. By degrees it is found out how far the change of facts and of ideas necessitates a permanent enlargement or modification of accepted general principles; and when this has come to pass, the time has arrived for an incorporation of the special law within

* Mont. Esp. des Lois, XXIX, 18.

33. The names of women should be agreeable, soft, clear, captivating the fancy, auspicious, ending in long vowels, resembling words of benediction.

34. In the fourth month the child should be carried out of the house *to see the sun* : in the sixth month, he should be fed with rice ; or that *may be done*, which, by the custom of the family, is thought most propitious.

35. By the command of the *Veda*, the ceremony of tonsure should be legally performed by the three *first* classes in the first or third year *after birth*.

36. In the eighth year from the conception of a *Brahmen*, in the eleventh from that of a *Cshatriya*, and in the twelfth from that of a *Vaisya*, let the father invest the child with the mark of his class :

37. Should a *Brahmen, or his father for him*, be desirous of his advancement in sacred knowledge ; a *Cshatriya*, of extending his power ; *or* a *Vaisya* of engaging in mercantile business ; the investiture may be made in the fifth, sixth, or eighth years respectively.

38. The ceremony of investiture hallowed by the *gáyatri* must not be delayed, in the case of a priest, beyond the sixteenth year ; nor in that of a soldier, beyond the twenty-second ; nor in that of a merchant, beyond the twenty-fourth.

39. After that, *all youths* of these three classes, who have not been invested at the proper time, become *vratyas*, or outcasts, degraded from the *gáyatri*, and contemned by the virtuous :

40. With such impure men, let no *Brahmen*, even in distress for subsistence, ever form a connexion in law, either by the study of the *Veda*, or by affinity.

41. Let students in theology wear *for their mantles*, the hides of black antelopes, of common deer, or of goats, with *lower vests of* woven *sana*,* of *cshuma*, and of wool, in the direct order of their classes.

42. The girdle of a priest must be made of *munja*,† in a triple cord, smooth and soft ; that of a warriour must be a bowstring of *murva* ; that of a merchant, a triple thread of *sana*.

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* *Sana* is both hemp (Cannabis sativa), and Bengal *san*, a plant from which a kind of hemp is prepared, *viz*. crotolaria juncea, and other kinds.

Cshuma, is the linum usitatissimum.

† *Munja* is a sort of grass (saccharum munja).

Murva is a sort of creeper, from the fibres of which bowstrings are made, (Sanseviera zeylanica).

43. If the *munja* be not procurable, their zones must be formed *respectively* of the grasses *cusa** *asmantaca*, *valvaja*, in triple strings, with one, three, or five knots, *according to the family custom*.

44. The sacrificial thread of a *Brahmen* must be made of cotton, so as to be put on over his head, in three strings; that of a *Cshatriya*, of *sana* thread only; that of a *Vaisya*, of woollen thread.

45. A priest ought by law to carry a staff of *Vilva*† or *Palasa*; a soldier, of *Vata* or *C'hadira*; a merchant of *Venu* or *Udumbara*:

46. The staff of a priest must be of such a length as to reach his hair; that of a soldier, to reach his forehead; and that of a merchant, to reach his nose.

47. Let all the staves be straight, without fracture, of a handsome appearance, not likely to terrify men, with their bark perfect, unhurt by fire.

48. Having taken a legal staff to his liking, and standing opposite to the sun, let the student thrice walk round the fire from left to right, and perform, according to law, the ceremony of asking food:

49. The most excellent of the three classes, being girt with the sacrificial thread, must ask food with the respectful word *bhavati*, at the beginning of the phrase; those of the second class, with that word in the middle; and those of the third, with that word at the end.

50. Let him first beg food of his mother, or of his sister, or of his mother's whole sister; then of some other female who will not disgrace him.

51. Having collected as much of the desired food as he has occasion for, and having presented it without guile to his preceptor, let him eat some of it, being duly purified, with his face to the east:

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* *Cusa* is a species of grass used in many solemn and religious observances, hence called sacrificial grass (Poa cynosuroides).

The *Asmantaca* does not occur in the dictionaries.

The *Valvaja* is a sort of grass (saccharum cylindricum).

† The *Vilva* is a fruit-tree, commonly named *Bel* (Ægle marmelos).

The *Palasa* is the Butea frondosa.

The *Vata* is the Ficus Indica.

C'hadira is a tree, the resin of which is used in medicine, *khayar* or catechu (Mimosa catechu).

The *Venu* is the bamboo, but the text says the *Pilu*, which is either the Careya arborea or the Salvadora Persica. It likewise implies the stem of the palm-tree.

The *Udumbara* is the glomerous fig-tree (Ficus glomerata).

PRIVY COUNCIL.

THE 13TH JUNE, 1879.

Present:

(*Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.*)

RAM CHUNDER BYSACK, *Appellant,*

versus

DINONATH SURMA SIRKAR, *Respondent.*

Evidence—Sale in Execution—Benamee—Judgment-debtor, Purchase for.

Benamee purchase by judgment-debtor of his own property in execution of decree against him is void in law.

Evidence raising presumption of purchase at a sale in execution being made *benamee* for the judgment-debtor discussed.

[Judgment of the High Court at Calcutta reversed.]

Appeal from a Decision of a Divisional Bench of the High Court at Calcutta.

Cowie, Q. C., and *Doyne*, for the Appellant.

C. W. Arrathoon, for the Respondent.

The following judgment was delivered by their Lordships of the Judicial Committee of the Privy Council:—

This is a suit which was commenced on the 8th January 1874 by the plaintiff, who seeks to recover possession of a 12 annas share in certain mouzahs which he claims to be his property, and out of which, he says, he was wrongfully ousted.

It is necessary for him to make out his title, and the way in which he attempts to make it out is under a sale in execution of a decree of the 31st May 1843, of the Principal Sudder Ameen of Faridpore. The sale under the execution did not take place until the 18th June 1863, when one Anund Lochun Nundi, the defendant No. 3, became the ostensible purchaser of the property. The plaintiff, however, says that Fakiruddin *alias* Azimuddin was the real purchaser, and that he, the plaintiff, subsequently purchased the property from Fakiruddin.

Two objections are made to the title of Fakiruddin as the purchaser of the property:—First, it is said that the Principal Sudder Ameen of Faridpore, who issued the execution under which the sale took place, had no jurisdiction to issue it, inasmuch as the district of Dacca was divided between two Principal Sudder Ameens, and that the property,

or a great portion of it, was situate, not within the jurisdiction of the Principal Sudder Ameen of Faridpore, but within that of the Principal Sudder Ameen of Dacca. The first objection, therefore, was that the execution was entirely void for want of jurisdiction on the part of the Judge who issued it. The next objection was that, assuming the execution to have been valid, the purchase under it by Fakiruddin was a fictitious purchase for the benefit of the judgment-debtor, Gorib Hossein, who was the representative of the original debtor Mahomed Joki Chowdhry. The first defendant claimed as a purchaser under a sale in execution against the said Gorib Hossein on the 7th June 1865, subsequent to the execution under which Fakiruddin purchased, and he, the first defendant, had been put into possession under his purchase.

Their Lordships will, in the first place, deal with the question of fictitious purchase, because if the purchase was fictitious the defendant Fakiruddin obtained no title under it,* and the property remained the property of Gorib Hossein, whether the Principal Sudder Ameen had jurisdiction or not. The Judge of the First Court, at page 198 of the Record, deals with the question of jurisdiction. The fourth issue which was raised in the case was whether the purchase by Fakiruddin was *benamee* for Gorib Hossein or not. The Judge of the First Court did not come to an express finding or declaration with reference to that issue. The whole of his argument, however, tends to show that in his judgment that issue ought to be found in favor of the first defendant. He says :—" The first sale, the defendant argues, was collusive and fictitious. His pleader shows that Gorib Hossein was indebted to some (?) In execution of a money-decree the claim which was upwards of Rs. 2,000—the valuable property which, according to the plaintiff's estimate of the value, is worth more than Rs. 10,000—was sold for Rs. 500; but still the decree-holder, who had a claim for upwards of Rs. 2,000, did not purchase it, and allowed the servant of defendant, who was a friend to Gorib Hossein, the judgment-debtor, to bid for it. Again, defendant No. 2 purchased it for a nominal price of Rs. 500, but did not proceed to take possession of the properties till the same properties were advertised for sale in execution of another decree. These facts the defendant takes as the evidence of collusion, and he pleads therefore that Gorib Hossein, in order to give color, went on ostensibly to object to the confirmation of the sale, but his endeavour was in reality

* Contract Act, s. 23 (ill.) i.—ED., *L. C.*

to create a title in favour of defendant No. 3 fictitiously, and himself to retain and enjoy possession of the property to the prejudice of his other just creditors. The first auction sale is dated 1st June 1863, the date of advertisement of the second sale is 31st March 1865, and the second sale took place on the 2nd June 1865; but the debtor, Gorib Hossein, continued to be in possession of the property and continued to discharge the public revenue on account of the estate down to the second auction. The first auction-purchaser, after a lapse of two years, and after the second sale, applied to the Principal Sudder Ameen of Faridpore for delivery of possession of the property. The date of delivery is Assar 1272 B. S., and the date of dispossession by the defendant is Bhadro of the same year, that is, a month after the delivery. These circumstances go to a great extent to speak in favor of the defendant's argument. It is certain that the judgment-debtor was in possession down to the second sale, and the attempt of defendant No. 2 (plaintiff's vendor) to take symbolical possession after the second sale does not sufficiently prove that he was in actual possession of the property. Under the circumstances I am clearly of opinion that the defendant No. 1, who by virtue of a legal title entered into possession of the property, is entitled to oppose any, or to dispute the title of any who may come to take possession from him. The question therefore comes, whether the first auction sale was a valid sale, and whether the first auction-purchaser acquired a valid title." The High Court, in dealing with that portion of the judgment, say, at page 208: "Now as to the question of *benamee*, it seems to us that there was no evidence to rebut the ordinary presumption in favor of the ostensible purchaser." The ostensible purchaser really was not Fakiruddin, but Anund Lochun Nundi. He was the person in whose name the property was purchased. "The delay which has been relied upon is only a delay of about six or seven months, because it appears that the purchaser was kept at bay by the judgment-debtor, who disputed the sale, appealed against the order rejecting his application, and continued those proceedings down to August 1864." The High Court treat those proceedings as real and *bonâ fide*, whereas the Judge of the lower Court stated that the defendant contended that they were not *bonâ fide* for the purpose of getting rid of the sale, but fictitious proceedings taken for the purpose of giving strength to the case that the purchase made by Fakiruddin had been made for his own benefit and not for the benefit of the judgment-debtor. The High Court make no remark with reference to the question whether

those proceedings were fictitious or not. They then go on: "It then appears that the papers were sent down to the Principal Sudder Ameen with a view to further proceedings in execution being taken on the 24th September 1864, and the purchaser made a petition to be put into possession on the 26th May 1865. Therefore the delay which had to be accounted for was only a delay of a few months, and that is a circumstance quite insufficient of itself to get rid of the rights of the plaintiff under his purchase. That being so, and the onus on that part of the case being entirely on the defendants, and the defendants not having discharged themselves of it as far as that plea goes, the judgment must be in favor of the plaintiff."

The substance of that decision is simply this,—that the mere delay in taking possession on the part of Fakiruddin or of Anund Lochun Nundi, was not of itself a sufficient badge of fraud to induce the Court to come to the conclusion that the purchase by Fakiruddin was *benamee* for the benefit of the judgment-debtor. They say:—"That being so, and the onus on that part of the case being entirely on the defendants, and the defendants not having discharged themselves of it as far as that plea goes, the judgment must be in favor of the plaintiff."

But there was evidence in the cause beyond that which was adduced as to the delay. There was the evidence of several witnesses. First that of a tenant at page 185 of the Record, to which Mr. Cowie has called their Lordships' attention, the evidence of Loknath Bonnerjee. He says:—"I am a tenant of the disputed mahal and hold lands therein. Formerly I used to pay rents to Mahomed Joki Chowdhry" (that is the judgment-debtor); "at present I pay rents to the defendant," meaning defendant No. 1. He does not say that possession was ever given, as far as his portion of the property was concerned, to Fakiruddin. He paid originally to the judgment-debtor, and subsequently to the defendant No. 1, who was the purchaser under the second execution.

Then again, at page 190 of the Record, there is some very strong evidence, that of the defendant's witnesses, to which the High Court did not allude at all. It is true it was not alluded to by the First Court. The Judge of that Court thought the delay sufficient of itself. But when the High Court thought that the delay was not sufficient, they ought, as it appears to their Lordships, to have referred to the evidence to see whether they believed or disbelieved the witnesses on the part of the defendant to prove that the sale was a fictitious one. Bharut

Chunder Dey, the defendant's witness No. 1, at page 190, says ;—"In the month of Jeyt of 1270 B. S., the disputed property was sold by auction at Faridpore on account of the debt of Gorib Hossein. Anund Lochun Nundi purchased it. Gorib Hossein paid the consideration money. I and Dagu Ram Dutt, and three sirdars went to Faridpore with the money. In the auction sale a bid of Rs. 500 was made, and the bargain having been struck in our name, we made over Rs. 500 to Anund. Anund made the said auction purchase for Gorib Hossein, Ajim Chowdhry, 'that is the *alias* of Fakiruddin, in a letter to Anund Nundi, requested him to make the auction purchase on behalf of Gorib Hossein. We took with us Rs. 3,003 for the auction purchase,' that was sufficient to cover the amount of the debt for which the sale was about to take place, and we paid Rs. 500. Gorib Hossein's superintendent gave us the said money. Knowing that the disputed property might be worth Rs. 10,000 or Rs. 12,000, we went to purchase it."

There was other evidence corroborating this witness' testimony, to which it is not necessary to refer further. There was no witness to contradict the evidence of those witnesses. Anund Lochun Nundi was not called. Fakiruddin was not called. If the evidence of the witnesses who stated that the money with which the estate was purchased in the name of Anund Luchun Nundi was sent by the judgment-debtor was not true, why did not Fakiruddin or Anund Lochun Nundi, or both of them, come forward and state that the evidence was false, and that Anund Lochun Nundi purchased the estate for Fakiruddin with money which Fakiruddin had supplied. But no evidence of the kind was given. The witnesses for the defendant No. 1 were uncontradicted, and there is nothing on the face of the proceedings to lead their Lordships to believe that the evidence of those witnesses was untrustworthy, and ought to be rejected as the evidence of witnesses who had perjured themselves.

But, beyond this, when the estate was sold to the defendant No. 1, and when the defendant No. 1 was put into possession of it, one would suppose that Fakiruddin, though he was only in ostensible possession of the property, would have made an application to the Court, under section 246, of the Code of Civil Procedure, stating, "You have attached and are about to sell under an execution property which I have already purchased under a previous execution ; do not sell this property, it is mine, and not that of the judgment debtor," and then the Judge in a summary way would have decided whether or not the property had been purchased by Fakiruddin or not. But no such application was made.

It was suggested that probably Fakiruddin and Anund Lochun Nundi did not know that the property was attached and about to be sold under the second execution. Assuming for the present purpose that they did not, one would suppose that as soon as they did know it, that is to say, as soon as the defendant No. 1 was put into actual possession of the property, and had got the ryots to attorn to him, Fakiruddin, if his case had been a genuine one, would have brought an action at once to turn him out and to contest his right to the property by virtue of the sale under the second execution. But he lay by, and no action was brought by Fakiruddin or by Anund Lochun Nundi for nearly nine years after the defendant had been put into actual possession of the property under his purchase, and then Fakiruddin commenced a suit in the Moonsiff's Court. The Moonsiff had not jurisdiction to try the cases to the extent of the value of the property, an objection was taken to his jurisdiction and then Fakiruddin sold the property to the plaintiff after the defendant No. 1 had been possession for nine years, and when there was a dispute and an action pending respecting the title.

That suit was afterwards dismissed, and the plaintiff brought the present action in 1874.

Under these circumstances, there is sufficient evidence to satisfy their Lordships that the purchase by Fakiruddin, if indeed he had purchased in the name of Anund Lochun Nundi, was a purchase *benamee* for the original judgment-debtor who furnished and supplied the money for that purpose.

Under these circumastances their Lordships think that the plaintiff is not entitled to recover. It is not necessary, therefore, to decide whether the Principal Sudder Ameen had jurisdiction to issue the execution under which the plaintiff's vendor purchased the estate, but their Lordships wish to be distinctly understood that they throw no doubt whatever upon the decision of the High Court by which it was held that the Principal Sudder Ameen had jurisdiction to issue the execution.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, the decree of the First Court affirmed, and the suit of the plaintiff be dismissed with costs in both the lower Courts.

The appellant must pay the costs of this appeal.

CALCUTTA HIGH COURT.

THE 15TH SEPTEMBER, 1879.

(Before the Hon'ble Mr. Justice Wilson.)

E. W. AUGUSTINE, *versus* C. F. AUGUSTINE.

Limitation—Adverse Possession.

There may be adverse possession against one who is ignorant of his rights.

Messrs. Phillips and Forsyth, instructed by Messrs. Orr and Harriss for the plaintiff.

Messrs. Branson and Stokoe, instructed by Messrs. Pittar and Wheeler for the defendant.

WILSON, J.—This case raises a question on the Limitation Act. The suit is brought to recover a house and land with mesne profits.

The house belonged to one Samuel Augustine, who died in 1855 intestate, leaving a nephew, Joshua Augustine, his heir-at-law, and a widow, Mary Augustine afterwards Mary Cones. She obtained letters of administration to his estate and took possession of the house and land, of which she remained in possession, or in receipt of the rents, down to her death in September 1877. The defendant obtained letters of administration to her estate and as such is in possession of the house and land. The plaintiff claims as brother and heir-at-law of Joshua Augustine who died in 1858.

The plaintiff and his immediate predecessor in title have never been in possession. The deceased lady was in possession from 1855 to 1877, since which time her representative has been so. The plaintiff seeks to meet this difficulty by showing that the possession was down to a late period not adverse. The facts relating to this are as follows:—

From the death of Samuel Augustine in 1855 down to January 1858, the possession of the widow was confessedly adverse. In 1856 she made a will in which she purported to dispose of this property for certain religious and charitable purposes. This is an act in itself enough to show her possession to be adverse. In January 1858 this will seems to have been shown to Joshua Augustine, who wrote a Memorandum at the foot of it in the following terms.

"26th January 1858."

I agree to the house and ryotty land herein alluded to of which I am heir-at-law, to be managed according to the terms of this paper by Aunty Mary, late Mrs. S. Augustine, and after her death I wish the

house and land to be taken possession of by the Catholic Cathedral, and the rents to be appropriated as laid down. The executors named can manage after Aunty Mary's death under the supervision of the Catholic Cathedral.

JOSHUA AUGUSTINE.

In the presence of

John F. Bellamy.

P. Gouse.

The lady continued in possession and in receipt of the rents, and so things went on till 1877.

At that time it would seem there were difficulties about the repair of the premises, and the lady not seeing her way to employ them profitably for the religious and charitable purposes originally contemplated, endeavoured to sell them.

A correspondence ensued, in the course of which the present plaintiff became aware of his title as heir-at-law, and in the result he asserted his exclusive right.

It was argued that the effect of the Memorandum written by Joshua Augustine in 1858 was to make the lady's possession, which had been adverse, no longer adverse; that she became thereby tenant at will of Joshua Augustine, and after his death continued tenant by sufferance of the present plaintiff; and that the possession became adverse only when the attempt was made to sell the property in 1877.

I do not think this is a true view of the matter. The lady acted from first to last as the owner of the property and did what she pleased with it. What Joshua Augustine wrote seems to me no more than an assent on his part to acts of ownership on hers adverse to the will. But possession means, in my opinion, not possession adverse to the will, but possession adverse to the right of the claimant. Otherwise there could not be adverse possession against one who is ignorant of his rights.

I am, therefore, of opinion that the plaintiff's claim is barred by limitation; and that the suit should be dismissed with costs.

175. The High Court, under s. 280 Act X. of 1872, altered a conviction from grievous hurt into one of murder and enhanced the punishment accordingly.—22 W. R., Cr, 5.

176. The word "reverse" in ss. 419 and 426, Code of Criminal Procedure (Act XXV. of 1861), ss. 280 and 283 of Act X. of 1872 means to make void, to set aside or annul, and not merely to change or turn into the contrary.—*Queen* v. *Elahi Bax*, B. L. R, (Sup. Vol.) 459.

177. The High Court on appeal being of opinion that the case was one where no circumstances of mitigation were set forth, and where, without any sufficient reason, the Judge had awarded a punishment which in ordinary cases would be quite inadquate, enhanced the punishment, under s. 280, Act X. of 1872.—*Queen* v. *Goojree Panday*, 11 B. L. R. 3.

178. Section 280 of the Code of Criminal Procedure authorizes an Appellate Court, subject to the proviso in the final sentence, to enhance any punishment that has been awarded.

As an Appellate Court, 1st Class Magistrate has power to pass any sentence, which Subordinate Magistrate might have passed.—I. L. R., 1 Mad. 54.

179. A Session Judge cannot, on appeal from a Magistrate's decision, inflict a term of imprisonment in commutation of a fine longer than that which the Magistrate himself could have inflicted.—*Reg.* v. *Hari bin Vithoji*, 1 Bom H. C. Rep. 139.

180. If in a case tried by jury, the High Court finds that inadmissible evidence has been received, but that, after setting it aside, there is other evidence on the record on which the jury may find a verdict of guilty, the High Court may reverse the conviction and sentence and order a new trial: Sec. 280 of the Criminal Procedure Code.—*Reg.* v. *Amrita*, 10 Bom. H. C. Rep. 497.

S. 282.

181. The omission of the word "dishonestly," both in the charge and in the record of the conviction, is not a ground for reversal of conviction and sentence, where an accused person has fully understood the nature of the offence with which he is charged, and has not been prejudiced by the omission.—*Reg.* v. *Rakhma*, 10 Bom. H. C. Rep. 373.

182. A case of assault tried by the Assistant Magistrate of Purneah, having been appealed to the Sessions Judge of that district, who ordered an enquiry and found that the assault had been committed in

Maldah and thereupon released the accused, as the Magistrate of Purneah had no jurisdiction—*Held* that the Judge had no jurisdiction under s. 70 Act X. of 1872 to make such an order, the accused not having been prejudiced in his defence; and that he ought not to have ordered the enquiry as to the place where the assault was committed, that question having no bearing on the guilt or innocence of the accused under s. 282.—23 W. R., Cr., 34.

183. Appeals from convictions on trials by jury, where illegal evidence has been admitted should be dealt with on the same principles as appeals in which there has been a misdirection by the Judge or an omission on his part to give the jury proper direction. The Appellate Court, where it finds that illegal evidence has been admitted, should consider whether it is such as is likely to have exercised a prejudicial influence on the minds of the jury, and if the Court be of opinion that it is so it will treat the case as if it had been tried by a Session Judge with the aid of assessors. If the evidence (after omitting that portion of it which should not have been admitted) is sufficient to sustain the verdict the conviction will be upheld.

In exceptional cases, where the evidence is of such a character as to suggest the consideration that its real value cannot fairly be appreciated except by a Court which has heard that evidence given, a new trial will be directed.—*Reg.* v. *Ramswamy Mudliar*, 6 Bom. H. C. Rep., 47.

184 *Held* (Warden, J. dissentiate), that the omission of the Session Judge to tell the jury that the statement of one prisoner is not evidence against his fellow prisoner is a material error, and one fatal to the trial, notwithstanding that the Session Judge dealt with the evidence against each of the prisoners separately.—*Reg.* v. *Shek Miyavald Dand*, 6 Bom. H. C. Rep., 10.

185. When an Appellate Court under sec. 282, of the Code of Criminal Procedure directs a Court of first instance to take additional evidence, an appeal on the merits to the High Court is not thereby given.—*Reg.* v. *Nantamram Uttamram*, 6 Bom. H. C. Rep., 64.

S. 283.

186. According to ss. 283 and 297, Act X. of 1872, the error to justify the setting aside of a Criminal trial on the ground of failure of justice, must be a material error.—19 W. R., Cr., 28. See also, 21 W. R., Cr., 43; 25 W. R., Cr., 26, 62.

So also under ss. 294 and 297.—21 W. R., Cr., 88; 25 W. R., Cr., 67.

187. The omission of a Magistrate to record a proceeding in a case of land dispute is not a mere informality in procedure, but renders the whole of his proceedings illegal.—4 W. R., Cr., 26. See also 16 W. R., Cr., 74; 17 W. R., Cr., 53; 25 W. R., Cr., 74.

So under s. 530 Act X. of 1872.—25 W. R., Cr., 74.

Not so under s. 283 Act X. of 1872.—22 W. R., Cr., 81. But see 25 W. R., Cr., 74.

188. A prisoner originally charged with an offence under one section and acquitted of that charge, was committed, on the day following that on which she was acquitted, for trial under another section without any witnesses being examined on the second charge, and without having any opportunity of cross-examining the witnesses on the first charge with respect to the second charge. *Held* that the irregularity was not one which was covered by s. 283 Act X. of 1872, and that the prisoner had been prejudiced thereby in her defence.—22 W. R., Cr., 14.

189. The want of any charge of an attempt to commit rape is a defect or error which is cured by s. 283 Act X. of 1872.—25 W. R., Cr., 51.

190. The rule in s. 283 Act X. of 1872 as to irregularity is intended to extend to all proceedings before Magistrates.—22 W. R., Cr., 81.

191. Where the accused was convicted without any formal complaint having been entered on the record as required by Section 144—*Held*, that the Magistrate had not entertained the case without complaint within the meaning of Section 34 and that a Court of appeal or revision could not reverse the sentence on the ground of the irregularity.—7 Mad. H. C. Rep., 25.

192. K. was tried by a Magistrate in a summary way and convicted. He appealed to the Court of Session, which quashed his conviction on the ground merely that the substance of the evidence on which the conviction was based was not embodied in the Magistrate's judgment. *Held* that the Court of Session should not have quashed the conviction merely by reason of such defect, but, if it found it impossible to dispose of the appeal because of such defect, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for the purpose, or to have ordered a retrial with that view.—*Empress of India* v. *Karan Singh*.—I. L. R., 1 All. 680.

193. An omission by a Magistrate to hold a preliminary inquiry on a charge under s. 307 of the Penal Code of attempting to murder, was, on appeal by the prisoner to the High Court, *held* to be an irregularity which prejudiced the prisoner in her defence, and the proceedings were ordered to be quashed, and a new trial held.—*Queen* v. *Itwarya.* 11 B. L. R., 54.

194. Failure to examine all the witnesses cited for the prosecution before discharging an accused person is an irregularity under Section 215 but this irregularity is not a sufficient ground for reversing the order of discharge unless it has caused a miscarriage of justice.—8 Mad. H. C. Rep., 5.

S. 284.

195. Where, on appeal from a conviction by a Subordinate Magistrate, the Magistrate of the District is of opinion that the offence which the evidence brings home to the prisoner is one not triable by a Magistrate, and that an illegality has been committed, he should refer the matter for the orders of the High Court, under Sec. 296 of the Criminal Procedure Code; such Magistrate cannot himself, under Sec. 284, annul the conviction, and direct the committal of the prisoner to the Court of Session upon the proper charge.—*Reg.* v. *Chanveraya bin Chanbasaya*, 5 Bom. H. C. R., 65.

196. T. was convicted by a Second Class Magistrate of intentionally outraging the modesty of a woman under section 354 of the Penal Code. On appeal the Magistrate of the District annulled the conviction thinking that the accused ought to have been tried for attempting to commit rape, an offence not triable by the Second Class Magistrate, and directed retrial of the case by a First Class Magistrate. On a reference by the Session Judge as to the legality of the course taken by the Magistrate of the District it was held that the Magistrate of the District has no power to annul the conviction and sentence under sec. 284 of the Criminal Procedure Code, but should report the matter for the orders of the High Court.—*Reg.* v. *Tukaram Ranu.* 12 Bom. H. C. Rep. 234.

S. 287.

197. Where a case is referred to the High Court under s. 287 Act X. of 1872, the Court is bound under s. 288 to go into the facts of the case, although the conviction was by the verdict of a jury.—19 W. R., Cr., 57.

S. 288.

198. Where a case is referred to the High Court under s 287

Act X. of 1872, the Court is bound under s. 288 to go into the facts of the case although the conviction was by the verdict of a jury.—19 W. R., Cr., 57.

199. Under section 288 of the Code of Criminal Procedure, the High Court, to which a reference is made by a Court of Session for confirmation of a sentence of death on conviction of murder, cannot, in the absence of an appeal, alter the conviction to one of culpable homicide not amounting to murder, if it be of opinion that the evidence does not establish the former but the latter offence. It must order a new trial for that propose.

When the prisoners were tried on two charges of murder and culpable homicide, not amounting to murder, and the opinion of the assessors was taken on both charges, but the Session Judge, being of opinion that the evidence established, the former charge, recorded a conviction and sentence for murder only, the High Court being of opinion, on a reference under section 287 of Act X. of 1872, that the offence proved was culpable homicide not amounting to murder, and did not order a new trial *ab initio* but directed the Session Judge to complete the trial by recording a finding on the second charge of culpable homicide not amounting to murder. —*Reg.* v. *Balapa Bin Dandapa.*—I. L. R., 1 Bom. 639.

S. 294.

200. According to ss. 283 and 297 Act X. of 1872, the error to justify the setting aside of a criminal trial on the ground of failure of justice, must be a material error.—19 W. R., Cr., 28. See also 21 W. R., Cr., 43; 24 W. R., Cr., 26, 62.

So also under ss. 294 and 297.—21 W. R., Cr., 88; 25 W. R., Cr., 67.

201. The questions which the High Court has to determine under ss. 294 and 297 Act X. of 1872 are questions of law or procedure which affect the decision, and not questions of fact depending upon conflicting evidence which has been considered by the Judge and upon which he has given his opinion adversely to the accused.—20 W. R., Cr., 40, 61. See also 24 W. R., Cr., 60; 25 W. R., Cr., 10, 74.

202. S. 294 Act X. of 1872 is limited to sentences and orders as distinct from judgments. The former may be altered or set aside by the High Court for illegality or impropriety; but the latter cannot be interfered with (except in such cases where the law gives an appeal on the facts) unless it be shown that there has been some material er-

ror of law which renders the conviction illegal and improper in law.—20 W. R., Cr., 61.

203. Where the High Court sent for the record of a case, and it appeared therefrom doubtful whether the evidence was sufficient to support the conviction, the Court refused to interfere, there being no material error in law or in the proceedings which rendered such conviction illegal and improper. *Per* Glover, J.—The power of the High Court under s. 294 of Act X. of 1872 is limited to sentences and orders passed by subordinate Courts, as distinct from judgments of such Courts, and a judgment cannot be interefered with (except in cases where the law gives an appeal on the facts), unless it be shown that it is contrary to law. *Per* Pontifex, J.—The High Court cannot, under s. 294 of Act X. of 1872, interefere with a conviction, unless there has been some material error of law which renders such conviction illegal and improper in law. In the Matter of the Petition of *Belilios*, 12 B. L. R. 249.

S. 295.

204. Where a Magistrate takes up a case under s. 295 Act X. of 1872, his only proper course is to proceed under s. 296 to report the case to the High Court for orders.—25 W. R, Cr., 30, 67.

205. A Joint Sessions Judge has no power to act under s. 295 Act X. of 1872, which applies only to the Sessions Judge of the Division.—25 W. R., Cr., 21.

206. The Magistracy are Subordinate to the Sessions Court only for the purpose of reference to the High Court in cases in which revision is required.—7 Mad. H. C. Rep. 23, 27.

S. 296.

207. The High Court is competent, under s. 297 Act X. of 1872, if it considers that the accused was improperly discharged, to order him not only to be tried, but also to be committed for trial; but from the absence of the words "order him to be tried" in s. 296, it would seem that a Magistrate cannot under that section direct a Subordinate Court to take further evidence in a similar case.—19 W. R., Cr., 56.

208. As to the power of a Sessions Judge under s. 296 of Act X. of 1872 to order commitment of a prisoner discharged by the Magistrate.—19 W. R., Cr., 30; 21 W. R., Cr., 41; 22 W. R., Cr., 67; 24 W. R., Cr., 70.

209. The interference of the High Court should not be sought under s. 296 Act X. of 1872 only because the Magistrate considers a more severe sentence on a different charge necessary; but there must

be matter on the record to show that the charge has been improperly framed, or that the sentence is clearly inadequate.—20 W. R., Cr., 22.

210. A Magistrate should, under s. 296 Act X. of 1872, exercise a discretion as to whether he will refer a case to the High Court, and is not bound to refer every case in which he may detect an error.—20 W. R., Cr., 40.

211. How Sessions Judges should make their report to the High Court under s. 296 Act X. of 1872.—20 W. R., Cr., 50.

212. After an accused person has been acquitted under Section 220 of the Criminal Procedure Code, it is not competent to the Session Judge to interfere under Sec. 296.—*Reg.* v. *Venku Narsu.* 9 Bom. H. C. Rep. 170.

213. A Sessions Judge has no power to release on bail persons convicted by the Magistrate, pending a reference to the High Court under s. 296 Act X. of 1872.—23 W. R., Cr., 40 ; 24 W. R., Cr., 7, 8.

214. A trial for the offence of cheating is not a Sessions case in which, under s. 296 Act X. of 1872, the Court of Sessions may order a commitment.—21 W. R., Cr., 41.

215. *Held* on a reference under s. 296 Act X. of 1872 that the High Court had no power to set aside an order of acquittal even where a Deputy Magistrate acted illegally and acquitted the prisoner improperly.—21 W. R., Cr., 21.

216. *See* No. 204.

217. The High Court declined to interfere under s. 296 Act X. of 1822 with the order of a Municipal Commissioner who was the editor of a newspaper and who had, prior to the disposal of the case, made very strong remarks on the case in his paper; holding that there was nothing illegal in his order, though he would have exercised a wise discretion if he had refused to sit as one of the Commissioners in the case.—21 W. R., Cr., 31.

218. An order by a Judge, under s. 296 of Act X. of 1872, directing a Magistrate to commit an accused person, who has been discharged at a preliminary enquiry, to take his trial in a Court of Session, must specify the particular act constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate.—*Queen v. Tarucknath Mookerjee.* 10 B. L. R. 285.

219. An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been dis-

charged under Section 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and ultra vires.

As the case was one of improper discharge and came before the Magistrate under Section 295 of Act X. of 1872, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that, that the accused were improperly discharged, might, under Section 297, have directed a retrial.

The case of *Sudya bin Sitya* differed from. In the Matter of the Petition of *Mokesh Mistree* and another.—I. L. R., 1 Calc. 282.

220. A Divisional Magistrate has no power to direct a Subordinate Magistrate to commit for trial before the Sessions Court persons discharged by the Subordinate Magistrate.—4 Mad. H. C. Rep., 30.

221. This Section read with the definition of Sessions case in Section 4 limits the power to direct a committal to cases which have been investigated with a view to committal —7 Mad. H. C. Rep. 28.

222. Where a Session Judge, on appeal, reversed a conviction passed by a Magistrate F. P. of an offence under Section 182 of the Indian Penal Code, (which the Magistrate F. P. was competent to try), and directed the Magistrate F. P. to institute proceedings against the accused under sec. 349 considering that, on the complaint which had been made to him, the Magistrate F. P. was bound to institute proceedings under the latter section.

The High Court reversed that part of the order of the Session Judge which directed the Magistrate F. P. to institute proceedings, as the case did not fall within sec. 435 of the old Criminal Procedure Code, (sec. 296 of the New Code) and there was no provision of law giving the Judge jurisdiction to make such an order.—*Reg.* v. *Gopal Lakshceman et al.* 5 Bom. H. C. Rep., 25.

223. Where a District Magistrate annulled a conviction passed by a Subordinate Magistrate, 1st class, of voluntarily causing hurt by means of an instrument for stabbing, cutting, &c, under sec. 324 of the Indian Penal Code (an offence cognisable by a Subordinate Magistrate) and directed the Subordinate Magistrate to commit the accused to the Court of Session for trial on the charge of voluntarily causing grievous hurt by means &c. (a charge cognisable by the Court of Session).

The High Court annulled the order of the District Magistrate, and restored the conviction and sentence of the Subordinate Magistrate.—*Reg.* v. *Hannappa bin Malappa*, 7 Bom. H. C. Rep., 37.

fully chosen and thoroughly approved. They should be cast in a form as far as possible resembling that of rules already accepted, or appear as the logical outcome of already recognized doctrines.* The new law would thus link itself naturally to the law previously existing, blend with it imperceptibly, and form a basis for a new departure. It is the characteristic of sound and fruitful principles to embrace an ever-widening mass of details within their operation. Contradictory rules and reasonings are either modified or perish before them. Those principles which in themselves are consistent with the elementary facts of human nature are sure as matters progress to be recognized as the proper complement of others already accepted. Thus, from step to step a logically organized system is formed, while by a process of reaction the character of the community itself in which this process is going on is moulded insensibly to a development in which the maximum of its beneficial energy can be put forth in the manifold lines of activity which the law leaves invitingly open in every direction consistent with the common welfare.

21. The leading principles of a Code, such as we have conceived it, would be principles of human nature itself, but principles arrived at by a process of scrupulous comparison. Its propositions should be broad, simple and readily intelligible.† Their remoter consequences should be left to be traced out by judicial interpretation and the play of the popular consciousness. The induction on which they are based should be wide and accurate for the very purpose of avoiding entanglement in the details of subordinate and derivative principles. A Code thus formed will not retard or hamper progress and development: it will afford a new outline to fill up, a new platform to start from, a new impulse to systematic thought. It is conceivable that here and there its rule will constitute a barrier in some direction which otherwise the course of social evolution would have taken; but the slight obstruction thus caused will be as nothing to the positive aid afforded by a well-devised and consistent scheme of fundamental laws. Such a scheme, by the standards it sets up, by the mental standing points which it provides and imposes, contains the most certain and effectual means of its own further ameli-

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* The concrete application of the law should be facilitated by the now familiar aid of illustrations of as simple a character as possible and drawn from actual cases or the incidents of every-day life.

† "Les lois ne doivent point être subtiles: elles sont faites pour des gens de médiocre entendement."—Mont. Esprit des Lois, XXIX., 16.

oration in the future. As the subtilties and complications of human affairs exceed the most sagacious human provision, it will be found in time that some rules are in effect out of harmony with others. Some will correspond to the spontaneous movement of society and some will not. It may be that those which years before rested on a more specious support of sentiment and reasoning, being in truth the weaker, their inexpediency by degrees comes out. The better-founded rules, meanwhile, gain more and more on the convictions of the community; and a sense of the real incongruousness of the two having arisen, the moment has come for revision and excision. Such a process is as inevitable as human work is necessarily imperfect; but a system sound as a whole will meanwhile have done much to form the character and the turn of legal thought which will make reparation easy and natural without any general disturbance.

22. Due regard being had to the considerations on which we have dwelt, it must be admitted that a variety of laws under the same Government is not only an embarrassment to the Courts, but an impediment to intercourse and fruitful activity. The business of merchants, bankers and carriers, pursued under different conditions in different localities, is hampered with difficulties which check enterprise resting on nice calculations and adjustments. The public law ought to be substantially the same throughout the territories under a Government, as otherwise people may expose themselves without knowing, without having reason to know it, to ruinous penalties. When Caste laws do not restrict intercommunion, uniformity of marriage and family-laws is as obviously desirable. The law relating to immoveable property and its incidents may well admit of considerable variations according to local circumstances. Landed estates are usually collected in one province and subject to one law; but even when this is not so, little or no practical inconvenience arises from a property in Bengal being held on a different tenure from one in Madras. Within the sphere of transactions variable at the will of those who engage in them, it is in the mutually dependent and ever extending operations of commerce that a need of uniformity of law first becomes apparent, and thus the law of contracts, first in fragmentary sections and then in a systematic collection of general principles, claimed early recognition in the formation of the Indian Code. As society with its desires and needs settles down, in various phases of its being, to an approximately permanent scheme of existence, the tendency to assimilation which in ruder times would have extended identical cus-

the sun has arisen," and, "before it has risen," and, "when neither sun nor stars can be seen:" the sacrifice, therefore, may be performed at any or all of those times.

16. He, whose life is regulated by holy texts, from his conception even to his funeral pile, has a decided right to study this code; but no other man whatsoever.

17. BETWEEN the two divine rivers *Saraswatí* and *Drishadwatí*, lies the tract of land, which the sages have named *Brahmáverta*, *because it was* frequented by Gods:

18. The custom preserved by immemorial tradition in that country, among the four *pure* classes, and among those which are mixed, is called approved usage.

19. *Curucshétra*, *Matsya*, *Panchála* or *Cányacubja*, and *Súraséna*, or *Mat'hura*, form the region called *Brahmarshi*, distinguished from *Brahmáverta*:

20. From a *Bráhmen* who was born in that country, let all men on earth learn their several usages.

21. That country which lies between *Himawat* and *Vindhya*, to the east of *Vinasana*, and to the west of *Prayága*, is celebrated by the title of *Medhyadésa*, or *the central region*.

22. As far as the eastern, and as far as the western oceans, between the two mountains just mentioned, lies the tract which the wise have named *Aryáverta*, or *inhabited by respectable men*.

23. That land, on which the black antelope naturally grazes, is held fit for the performance of sacrifices; but the land of *Mléch'has* or *those who speak barbarously*, differs widely from it.

24. Let the three first classes invariably dwell in those before-mentioned countries; but a *Sudra*, distressed for subsistence, may sojourn wherever he chooses.

25. Thus has the origin of law been succinctly declared to you, together with the formation of this *universe*:* now learn the laws of the several classes.

* The word "universe," has, by an errour of the press, been printed in Italick instead of Roman letters, as it originally stood in Sir W. Jones's works. It may not be uninteresting to observe, that the word *sarva*, employed here to signify the universe, in its original and primary sense implies *all*, or *the whole*. Hence it is employed as an epithet of SIVA, as well as of VISHNU, by the worshippers of those Gods, agreeably to the Hindu doctrine, that contemplates the *universal whole* through any one of its multiform parts. In the account given in Enfield's History of Philosophy,[1] it will be seen that ZARVA was the chief of all the

[1] Vol. I. p. 64.

26. WITH auspicious acts prescribed by the *Véda*, must ceremonies on conception, and so forth, be duly performed, which purify the bodies of the three classes in this life, and *qualify them* for the next.

27. By oblations to fire during the mother's pregnancy, by holy rites on the birth of the child, by the tonsure of his head with a lock of hair left on it, by the ligation of the sacrificial cord, are the seminal and uterine taints of the three classes wholly removed:

28. By studying the *Véda*, by religious observances, by oblations to fire, by the ceremony of *Traividya*, by offering to the Gods and Manes, by the procreation of children, by the five great sacraments, and by solemn sacrifices, this human body is rendered fit for a divine state.

29. Before the section of the navel string a ceremony is ordained on the birth of a male: he must be made, while sacred texts are pronounced, to taste a little honey and clarified butter from a golden spoon.

30. Let the father *perform or, if absent*, cause to be performed, on the tenth or twelfth day *after the birth*, the ceremony of giving a name; or on some fortunate day of the moon, at a lucky hour, and under the influence of a star with good qualities.

31. The first part of a *Bráhmen's* compound name should indicate holiness; of a *Csahtriya's*, power, of a *Vaisya's*, wealth; and of a *Súdra's*, contempt.

32. Let the second part of the priest's name imply prosperity; of the soldier's, preservation, of the merchant's, nourishment; of the servant's, humble attendance.

Gods among the Persians, and produced the good and evil principles, or HORMISDA and SATANA. I think, from the evident connexion between the religious systems of the Persians and the Hindus, the identity of the god ZARVA and the SARVA of India must be incontestible; and we are thus enabled to take a new and most accurate view of the real nature of the Magian religion. In it we find the same prevailing idea common in all the theogonies of the ancients, namely, the finite nature of their gods, and their subordinate rank, as the personifications or the powers of the *boundless whole*, that is, of *nature*. Moses Chorenensis speaks of the same mythological character under the name of ZEROVAN. Anquetil du Perron in his Zend Avesta,[a] likewise mentions ZERVAN, whom he considers as time personified; but the sense of the word *Sarva* or *Sarvam* enables us at once to find a clue to the real nature of "the chief of all the Gods." Good and evil were, under this point of view, the inevitable results or offspring of material existence; and the pantheism which saw *God in all*, by the language of personification, made *Sarva*, or *the whole*, the parent of the two principles, which were named HORMISDA and SATANA.

[a] Tom. II. 90. *n.* 2.

INDEX.

CALCUTTA HIGH COURT.

THE 2ND APRIL, 1879.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

NARAIN BABU* (Defendant) *Appellant,*

versus

GOURI PERSAD BIAS (Plaintiff) *Defendant.*

Bond—Interest payable Monthly—Specified date for Payment—Limitation Act (IX. of 1871), *sched. ii., arts.* 65, 75—(*Act XV. of* 1877, *sch. ii., arts.* 66 *and* 75.)

The defendant executed a bond, which provided that interest should be payable monthly, and that the principal should become due within six months from the date of execution; the bond contained a clause to the effect that if the interest should not be paid according to the terms of the bond, or if the creditor should feel any doubts as to his being able to realize the principal, he should not be bound to wait until the expiry of the six months in order to bring his suit, but should be at liberty to realize the principal and interest in any manner he might choose,—*held,* that a suit on the bond brought within three years from the date of the day specified therein for payment, was not barred by limitation, as the case fell under art. 65 of sched. ii. of Act IX. of 1871, and not under art. 75 of sched. ii. of that Act.

On the 28th November 1873, one Narain Babu executed a bond in favour of one Gokul Chund to secure the sum of Rs. 5,000 with interest at 2 per cent. per mensem; the bond contained a clause to the following effect:—"I shall repay the said sum within six months, and the interest I shall pay month by month; but if I should fail to pay the interest in every month, or you shall feel any doubts as to being able to realize the principal amount, you shall not be bound to wait till the expiry of the term mentioned, but shall be at liberty to realize the money, principal with interest, from me and my heirs and from my moveable and immoveable properties, in whatever way may seem fit; that if within the term of the bond the money shall not be paid, the condition in respect of interest shall stand as it is."

On the 30th May 1876, Gokul Chund sold his right in the bond to the plaintiff, who after demand of payment brought the present suit within three years from the due date of the bond to recover the amount of principal and interest due under the bond, amounting to Rs. 8,900.

The defendant denied the execution of the bond and the receipt of the money from Gokul Chund.

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* *Vide* I. L. R., 5 Calc. 21.

The Subordinate Judge found that the bond was a valid one, and that it had been executed by the defendant, and the consideration therefore received by him; he therefore gave a decree in favor of the plaintiff with costs.

The defendant appealed to the High Court.

Baboo *Chunder Madhub Ghose* and Baboo *Prannauth Pundit* for the appellant.—The suit is barred by limitation, and although the ground was not taken in the lower Court, or in our grounds of appeal, the Court is bound to notice it. Limitation ran in this case from default in the first payment of interest. The plaintiff was bound to bring his suit on the breach of the first payment of interest, that is to say, one month after the date of the bond, and that being so, the first payment of interest was due in November 1874, and the three years allowed to the plaintiff to bring his suit under cl. 75 of sched. ii. of Act IX. of 1871 had expired before he brought this suit. The case of *Hurronauth Roy* v. *Maheroollah Moolah* (1) lays down that the period of limitation runs from the first default. [GARTH, C. J.—Here it is not a case where a bond is payable by instalments; it is clearly optional on the part of the obligee to bring his suit at once or not under the terms of the bond. You say that on default in the first payment, the obligee is bound to bring his suit, and so deprive himself of the benefit of the terms of the bond. Unless we are bound by the decision of the Full Bench quoted above, the obligee can bring his suit according to the terms of the bond.] The case of *Hullodhur Bangal* v. *Hogg* (2) lays down that limitation runs from the time of the first default. The case of *Hemp* v. *Garland* (3) decides that if a plaintiff likes to wait to sue until the last instalment is due, limitation runs from the time from which plaintiff might have brought his action. [GARTH, C. J.—In that case the suit was not a bond, but a warrant of attorney, and it was held that the statute ran from the time when the plaintiff's right to sue began. I can see a difference between a case where a bond is payable by instalments, and a case where by non-payment of interest the whole sum due under the bond becomes payable at once.] In *Mohee Sahoo* v. *A. J. Forbes* (4) it was decided that in a suit for breach of contract, limitation counts from each breach of contract as it arises. The respondent will rely on cl. 65 of sched. ii. of Act IX. of 1871, which states that limitation runs from the date of the "day specified" for payment

(1) 7 W. R., 21. (2) 1 W. R., 189. (3) 4 Q. B., 519.
(4) 6 W. R., Act X. Rul. 61.

in the bond, but those words mean not the specified date of the bond, but the specified date of each consecutive instalment.

Mr. *Evans* for the respondent.—The appellant says that the first payment of interest became due one month after the date of the execution of the bond, and supposing the cause of suit to have accrued then, we are barred. But where a bond runs in the terms of the bond now in suit, then it is evident that the meaning of the bond points to a possible exercise of a privilege which the obligee might clearly waive unless there is a rule of law preventing him from so doing. The Full Bench case cited, refers to cases of instalment bonds; our case is that of a common bond; and moreover, the Full Bench case is governed by Act XIV. of 1859, and ours is governed by Act IX. of 1871, which says that limitation "runs from the time of the first default, unless when the payee waives the benefit of the provision, and then from a fresh default;" these words have the effect of upsetting the Full Bench. Supposing the reading of the Court is that "the day specified" is the "date specified" in the bond, we are safe under art. 65; if neither art. 65 or 75 are held to apply, then we come under art. 118, which allows suits which are not mentioned in the schedule to be brought within six years.

[GARTH, C. J.—We are satisfied that the case comes under art. 65, and not under art. 75, and we are ready to hear the appellant on the merits.] (The case was then heard, and a decision on the merits given in favor of the plaintiff, respondent.)

CALCUTTA HIGH COURT.

THE 19TH DECEMBER, 1879.

Before Mr. Justice Wilson.

SHIBKRISTO SIRCAR, *Plaintiff*,

versus

ABDOOL HAKEEM, *Defendant.*

Plaint, Amendment of—Variance between case in plaint and evidence —Civil Procedure Code (Act X. of 1877), sec. 53.

In a suit to recover the balance of an account which the plaintiff in his plaint alleged to be due from the defendant for the hiring of certain boats, the defendant denied that the boats had been hired by him, stating that he had been employed by the plaintiff merely as an agent to find hirers—upon the evidence, it was found that the defendant's version was correct—

Held, that the plaintiff was not entitled to an account and discovery from the defendant as his agent, such relief not having been asked for in his plaint.

Held, also, that the plaintiff could not be allowed to amend his plaint by adding an alternative prayer in order to meet the view of the case appearing on the evidence.

In this case the plaintiff sued the defendant to recover the sum of Rs. 3,121, the balance of an account for the hiring, as he alleged, of certain cargo boats. No other relief was asked for in the plaint.

The defendant in his written statement denied that he had (except on particular occasions, when he had paid for the hire of the boats engaged by him) hired the plaintiff's boats. He admitted, however that he had acted as agent for the plaintiff for the purpose of finding hirers for his boats.

Upon these allegations the case came on for hearing, and witnesses were examined on both sides. From the evidence adduced it appeared that the defendant's account of the relation between himself and the plaintiff was the correct one.

Thereupon the plaintiff, by his Counsel, submitted that if he were not now entitled to an account and discovery from the defendant, he was entitled to have leave granted to amend his plaint in order to meet the state of facts appearing on the evidence.

T. A. Apcar and *Mitter*, for the Plaintiff.

Kennedy and *Bonnerjee*, for the Defendant.

T. A. Apcar.—It is for the Court, on the statements in the pleadings, to determine the real issue—*Arbuthnot* vs. *Betts*, 6 B. L. R, 273. On the authority of that case the Court may now order the defendant to account to the plaintiff as his agent.

[WILSON, *J.*—But in that case the plaintiff was in either view entitled to the same relief, viz the price. The question raised was fully considered by the Privy Council in *Eshen Chunder Singh* vs. *Shama Churn Bhutto*, 11 M. I. A., 7, where it was laid down that the state of facts originally alleged and pleaded by the plaintiff should not be departed from.]

But under section 53 of the Civil Procedure Code the plaint may be amended at any stage, and even now we are entitled to ask that an alternative prayer for relief, on the assumption of agency, may be inserted. See *Lakshmibai* vs. *Haribin Ravji*, 9 Bom. H. C. R., 1.

[WILSON, *J.*—The plaintiff had full warning of the case alleged by the defendant, and it is too late now to ask for amendment.]

Kennedy for the defendant contended that the plaintiff ought not to

be allowed to make a case in contradiction of that which he had set up. He relied on *Eshen Chunder Sing* vs. *Shama Churn Bhutto,* 11 Moore's I. A.; *Denniston* vs. *Little,* 2 Sch. and Lef. 11, note; *Lukhee Kanto Dass Chowdhry* vs., *Sumeerudi Lusker,* 13 B. L. R, 243.

The following judgment was delivered by

WILSON, J.:—The case of the plaintiff, as set out in his plaint, is that the defendant hired cargo boats of him, and that a balance of Rs. 3,121 is due to him on that account. He prays judgment for this sum without any other prayer for relief.

The defendant's case, as set out in his written statement, is that he was not the hirer of the plaintiff's boats, but was only employed as an agent to find hirers for them, except in the case of certain boats for which he had paid.

I have come to the conclusion on the whole of the evidence that the defendant's version is the true one, and that the plaintiff cannot recover against the defendant as the hirer of his boats.

It was said, however, for the plaintiff, that even on the defendant's own account of the facts he was entitled to an account and discovery. *Primâ facie* no doubt a principal is entitled to such relief against his agent. But I think it clear that the plaintiff cannot have such relief in this suit as at present framed. I cannot give him relief for which he has not asked, on the ground of a state of facts, the contrary of that which he has asserted.

It was said, however, that the plaintiff might be allowed to amend his plaint to meet this view of the case. I think, however, when the parties have come to trial to determine which of two stories is true, it would be a dangerous precedent to allow the plaintiff to amend, by abandoning his own story and adopting that of the defendant, and asking relief on that footing. The question whether on that footing the plaintiff is entitled to relief is one to which in such case the defendant's attention has not been called, and as to which he has had no opportunity of answering. Nor would much have been gained by amending, for it could in fairness only have been on the terms of the plaintiff's paying all the costs of the suit. The suit will be dismissed with costs.

CALCUTTA HIGH COURT.

THE 22ND JANUARY, 1880.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

PROSUNNO COOMAR ROY CHOWDRY, (Defendant) *Appellant,*

versus

HARAN CHUNDER CHATTERJEE, (Plaintiff) *Respondent.*

Regulation XVII. of 1806, *section* 8—*Mortgage, Foreclosure of—Property situated in different Districts.*

In foreclosure proceedings where the property mortgaged is situated in different districts, it is sufficient under Regulation XVII of 1806, section 8 for a notice of foreclosure to be issued by the Judge of either district. *Rasmoni Dabea* vs *Pran Kishen Das,* 4 Moore's I. A., 392, followed.

Baboo *Grija Sunkur Moozoomdar,* and Baboo *Bungsheedhur Sen,* for the Appellant.

Baboo *Kashee Kant Sein,* for the Respondent.

Appeal from a decision passed by the Officiating Judge of Furreedpore, affirming a decision of the Subordinate Judge of that District.

The plaintiff in this case instituted proceedings for the purpose of foreclosing a mortgage executed by the defendant. At the time of the foreclosure the mortgaged property was found to be partly in the district of Dacca and partly in that of Backergunj, and the notices required under Regulation XVII. of 1806 were issued by the Judge of the latter district.

The plaintiff now sued in the Court of the Subordinate Judge of Furreedpore for possession of the mortgaged lands, and obtained a decree, which was affirmed on appeal by the District Judge.

The defendant thereupon preferred this second appeal to the High Court.

The Judgment of the High Court, which was as follows was delivered by

JACKSON, J. :—The point in question here, viz., as to the authority of the District Court to issue the notice of foreclosure under section 8, Regulation XVII. of 1806, has been, as pointed out by Baboo Kashee Kant Sen, who appears for the respondent, authoritatively settled by the Judicial Committee in the Privy Council in a case to be found in 4 Moore's Indian Appeals, 392—*Rasmoni Debea* vs *Pran Kishen Das,* and unless there were absolute legislative provisions to the contrary, we should certainly follow that ruling, and I may be permitted to add, the reason of it appears unquestionable. The property mortgaged in this instance lay partly, perhaps originally wholly, within the district of Backergunj, and the instrument of mortgage, we understand, was registered in that district. Clearly, therefore, that was the proper Court to apply for proceedings in foreclosure. The appeal is dismissed with costs.

124. Where the charge was originally one of dacoity under s. 395 Penal Code, but during the progress of the case the charge under that section was lost sight of and the accused were put on their defence on a charge of being members of an unlawful assembly under s. 143,—*Held* that, had the complaint been one under s. 143 and not under s. 395, it might have been made the subject of a summary trial.—21 W. R., Cr., 89.

125. Where an accused was charged with theft of a box containing 50 Rs. in cash and of the box worth 8 annas 6 pies, the Magistrate considered the box to be of no value and struck out the 8 annas 6 pies, and therefore dealt with the case as a summary trial under s. 222, Act X. of 1872. *Held* that the Magistrate was not at liberty, upon his own authority and without taking evidence, to throw the box entirely out of consideration, as upon that depended his jurisdiction to dispose of the case summarily.—22 W. R., Cr., 65.

126. A charge of mischief, even if combined with one of theft, is triable summarily under s. 222, Act X. of 1872.—25 W. R., Cr, 5.

127. If on appeal from a summary trial under Chapter. XVIII. of the Criminal Procedure Code, Act X. of 1872, the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him.—*Queen* v. *Kheraj Mullah.* 11 B. L. R., 33.

S. 227.

128. S. 227 Act X. of 1872 is intended to apply only to short and simple cases in which but little evidence is needed.—25 W. R., Cr., 65.

S. 228.

129. Under s. 228 Act X. of 1872, the Magistrates are not bound to record the substance of every separate deposition, but to state generally what is the substance of the witnesses' evidence.—25 W. R., Cr., 6.

S. 232.

130. With reference to ss. 232 and 425 Act X. of 1872, where an accused person at his trial appears to the Sessions Judge to be of unsound mind, the trial of the issue of insanity is part of the trial of the accused, and ought to be tried by the jury and not by the Judge personally.—19 W. R., Cr., 15.

131. Where on the trial of a prisoner by a Sessions Judge, the Judge, entertaining some doubt as to the prisoner's sanity, took the evidence of the Civil Surgeon, and himself decided that the prisoner

was of sound mind and capable of making his defence, whereupon the trial proceeded, and the prisoner was convicted.—*Held*, that the conviction must be set aside, and a new trial directed reading ss. 232 and 425 of the Criminal Procedure Code together. The preliminary issue of soundness of mind or otherwise ought to have been tried by the jury and not by the Judge personally.—*Queen* v. *Bheeko Kalwar*, 10 B. L. R., 10.

S. 235.

132. An Advocate of the High Court may appear on behalf of the prosecution in the Court of Sessions and conduct the prosecution without being specially empowered in that behalf by the Magistrate of the district under s. 235 Act X. of 1872.—23 W. R., Cr., 14.

S. 249.

133. The purpose of section 249 of the Criminal Procedure Code, as amended by Section 20 of Act XI. of 1874, is to make depositions given before Magistrates in preliminary inquiry evidence in the trial before the Court of Session, only when the Session Judge determines, in the exercise of his discretion, that they are to be used in this way. But the exercise of this discretion, considering it as a matter of fact or law, is open to review by the Appellate Court.—*Reg.* v. *Arjuna Magha and Manna Jeese*, 11 Bom. H. C. Rep., 281.

134. The discretion conferred by the above section should be exercised upon substantial materials rightly before the Court and not upon mere speculation or conjecture.—21 W. R., Cr., 49.

135. On the trial of a prisoner for the murder of his wife and child, the witnesses for the prosecution gave evidence contradicting the evidence given by them before the committing Magistrate; and the Sessions Judge, purporting to act under s. 249, Act X. of 1872, discarded the evidence taken before himself, and grounded his judgment on the evidence given before the Magistrate, and on this evidence convicted the prisoner, and sentenced him to death. On appeal by the prisoner, *held*, that s. 249 did not warrant such a course of proceeding. That section merely authorizes the Court to take a particular statement, made by a witness before the Magistrate as true statement, notwithstanding that it is denied, or a statement inconsistent with it was made by the witness before the Judge, only if the Judge should see that the original statement was worthy of belief, and does not mean that the Court should discard wholly the testimony of witnesses before

it and have recourse to the testimony of the same persons given before another officer.—*Queen* v. *Amanulla*, 12 B. L. R., 15.

136. In order to render the deposition of a witness before the Magistrate admissible in evidence under s. 249, Act X. of 1872, it must have been duly taken by the Magistrate in the presence of the accused, and must be certified by the Magistrate so as to afford *primâ facie* evidence under s. 80 Act I. of 1872 of the circumstances mentioned in it. —21 W. R., Cr., 5.

137. A Court of Sessions is not at liberty under s. 249, Act X. of 1872, to ground its judgment on the depositions taken by the Magistrate without taking the examinations of the witnesses afresh.—24 W. R., Cr., 11.

S. 250.

138. A conviction and sentence for criminal breach of trust as a public servant, reversed, owing to irregularities in the preliminary inquiries, and irregular procedure as to the examination of the prisoner in the Court of Session.—*Reg.* v. *Diaz*, 3 Bom. H. C. R , 51.

S. 251.

139. If an accused has not his witnesses present, the Judge should, under s. 251, Act X. of 1872, if he sees ground for proceeding, first call upon him for his defence, and then postpone the case.—23 W. R., Cr., 58.

S. 255.

140. On a trial by jury, the Session Judge, in summing up, should give a full and detailed statement of the evidence on both sides; he should point out the legal bearing of it, and what weight the jury ought to attach to its several parts. His omission to do so, if *the accused is thereby prejudiced* amounts to such an error in law as would justify a Court of appeal in setting aside the verdict.

No general rule can be laid down as to when a prisoner is prejudiced by a defective summing up, but in general, if the finding of the jury in such a case is one that an appeal Court would set aside if the trial had taken place with the aid of assessors, the Court will interfere and set the verdict aside.

In capital cases, and all cases of a serious or complicated nature, the Judge ought to read over the evidence in extenso to the jury. The Judge ought, if requested, to allow the accused an opportunity of cross-examining all witnesses whose depositions have been taken for the prosecution by the committing Magistrate, but whose evidence is dispensed

with by the prosecutor at the trial. His refusal to do so is, however, not an error in law.

Where the Magistrate erroneously treated a witness as an accomplice, and granted him a conditional pardon :

Held that his evidence did not require corroboration.—*Reg.* v. *Fattechand Vastachand*, 5 Bom. H. C. R., 85.

141. Where an accused is tried on two charges, the assessors should, under ss. 255 and 261, Act X. of 1872, give a definite opinion whether he is guilty of either of the offences charged, and if so of which, and the Judge, in delivering judgment, should give it with advertence to the opinions of the assessors.—22 W. R., Cr., 34.

142. In a trial conducted with the aid of assessors, the Judge's omission to state the ground of his decision is not an illegality which invalidates the conviction.—*Reg.* v. *Kalu Karsan et. al.*, 6 Bom. H. C. Rep , 55.

S. 257.

143. In dealing with a reference made by a Sessions Judge under s. 263 Act X. of 1872, in consequence of his disagreeing from the verdict of the jury, the High Court must deal with it as an appeal by the prosecution, and has authority to convict the accused person on the facts and to pass sentence accordingly ; s. 257, by which the Court has to decide which view of the facts is correct, being read as qualified by s. 263. —20 W. R., Cr., 70.

S. 261.

144. *See* No. 141.

145. When a judgment of acquittal is recorded, it is not necessary to record the opinions of the assessors.—*Reg.* v. *Parvati*. 7 Bom. H. C. Rep. 82.

S. 263.

146. Where the Sessions Judge, differing from the jury in a verdict of acquittal, refers the case to the High Court under s. 263 Act X. of 1872, the High Court will not interfere without the clearest proof that the jury were mistaken. 19 W. R., Cr., 45, 57 ; 20 W. R., Cr., 16, 20, 73 ; 21 W. R., Cr., 4 ; 24 W. R , Cr., 80.

147. A Sessions Judge may, under s. 263, Act X. of 1872, submit to the High Court a case in which he disagrees with the jury in their finding of facts as well as when he complains that the jury has not followed his directions as to the law.—20 W. R., Cr., 1.

148. In a case referred to the High Court under s. 263, where the

Sessions Judge differed from the verdict of the jury, the right to begin was held to be on the party who called for a conviction.—20 W. R., Cr., 33.

149. In dealing with a reference made by a Sessions Judge under s. 263 Act X. of 1872 in consequence of his disagreeing from the verdict of the jury, the High Court must deal with it as an appeal by the prosecution, and has authority to convict the accused person on the facts and to pass sentence accordingly; s. 257, by which the Court has to decide which view of the facts is correct, being read as qualified by s. 263.—20 W. R., Cr., 70.

150. S. 263 Act X. of 1872 contemplates only a case in which the Sessions Judge, disagreeing with the jury, refers the whole case without rendering any order of acquittal or conviction; but not a case where the Sessions Judge has approved of a verdict on some of the charges and after finally acquitting and discharging the accused as to these charges, refers the case as to another charge to the High Court.—20 W. R., Cr., 73.

151. There can be no verdict delivered and no verdict finally recorded until the last of the questions put by the Sessions Judge under s. 263 is answered, and the verdict then given should be entered as the verdict of the jury.—21 W. R., Cr., 1.

152. On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held*, that the High Court had power to set aside the verdict of the jury, and to direct an acquittal. S. 263 of the Criminal Procedure Code (Act X. of 1872) explained.—*Queen* v. *Koonjo Leth*, 11 B. L. R. 14.

153. The Court should exercise the powers vested in it by s. 263 of the Criminal Procedure Code (X. of 1872) only when it finds the verdict of the jury clearly and patently wrong, and only set such verdict aside even if the Sessions Judge disagrees with it, when it is found unsustainable by the evidence.—*Queen* vs. *Sham Bagdi*.—13 B. L. R. 19. *Queen* vs. *Nobin Chundra Banerjee*, 13 B. L. R. 20.

154. The "dissent" referred to in the 4th clause of section 263 of the Criminal Procedure Code (Act X. of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court.—*Imperatrix* v. *Bhawani Bin Pandji* and *Sakharam Bin Khundoji*.—I. L. R., 2 Bom. 525.

155. When the jury acquitted the prisoners on the charge framed,

but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by section 457 of the Criminal Procedure Code. *Held*, that the High Court, could, on the case coming before them under section 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.—The *Empress* v. *Harai Midha* and *Umed Sardar*.—I. L. R., 3 Calc. 189.

156. *Quære.* Whether the accused should have notice of any action proposed to be taken by the High Court under s. 263, Act X. of 1872, when the Sessions Judge, differing from a majority of jury in a verdict of acquittal, referred the case to the High Court under that section to be dealt with as an appeal.—19 W. R., Cr., 38.

S. 266.

157. A petition of appeal in a Criminal case may be presented to the Appellate Court by any person authorized by the appellant to present it.—In the Matter of *Subba Altala.* I. L. R., 1 Bom. 304.

S. 269.

158. Although the effect of Section 7 of the Code of Criminal Procedure is to give exclusive original jurisdiction to the Magistrate of the District in the trial of cases under Section 7 of Regulation XXI. of 1827 for abetting the smuggling of opium, that Sec. (7) does not exclude the appellate jurisdiction vested in the Court of Session by Section 269 of the Code.—*Reg.* v. *Sadu Dadabhai.* 9 Bom. H. C. Rep. 166.

S. 272.

159. On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under Section 263 of the Criminal Procedure Code.

The Local Government, thereupon, directed the Legal Remembrancer to appeal under Section 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader.

Held, that the appeal was duly made. *Held*, further, that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of Section 272. *Held* also, that there being an acquittal on the charge

of murder, the appeal by.—*The Empress of India,* v. *Jadoo Nath Gangooly.* I. L. R., 2 Calc. 273.

160. Where a Session Judge upon appeal might have convicted the defendants under a different Section of an Act from that under which they were convicted by the Magistrate but instead of doing so acquitted them.—*Held*, that this was not a case which called for the interference of the High Court under Section 272.—7 Mad. H. C. Rep. 339.

161. Under section 272 of the Criminal Procedure Code, as amended by section 23 of Act XI. of 1874, an appeal against an acquittal presented by Government six months after the date of the judgment complained of is barred by lapse of time, even though the six months expired on the day the amending Act became law.

The amended section 272 should be read by itself, and not as a clause of the ordinary statute of limitations.

The Court will not, under section 297, interfere with an acquittal.—*Reg.* v. *Dorabji Balabhai.* 11 Bom. H. C. Rep., 117.

162. Where the High Court, under s. 272, Act X. of 1872, set aside an order of acquittal and convicted the accused of the offence charged.—23 W. R., Cr., 50.

163. The words "appellate judgment of acquittal" in s. 272 Act X. of 1872 include all judgments of an Appellate Court by which a conviction is set aside.—24 W. R., Cr., 41.

164. In an appeal under section 272 of Act X. of 1872, the High Court has power to order the accused to be arrested pending the appeal.—*The Queen* v. *Gobind Tewari.* I. L. R., 1 Calc. 281.

S. 273.

165. For purposes of appeal the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence.

Semble.—That where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed.

But if a separate sentence be passed on each head, an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial within the jurisdiction of the Appellate Court.—*Reg.* v. *Gulam Abas.* 12 Bom. H. C. Rep. 147.

166. Where several persons are tried together and convicted

rioting, and some of them are sentenced to pay each a fine of Rs. 50 or in default of payment to undergo rigorous imprisonment for a month and the others are sentenced to severer punishments, those of the accused who are only fined Rs. 50 have no right of appeal along with those who are sentenced to severer punishments.—*Reg.* v. *Kalubhai Meghabhai et. al.* 7 Bom. H. C. Rep. 35.

167. *Quære* as to whether from a sentence of one month's imprisonment passed by a District Magistrate under sec. 2 of Act IX of 1863 a regular appeal lies.—*Reg.* v. *Jivan Usman and others.* 3 Bom. H. C. Rep. 12.

S. 278.

168. The omission of an Appellate Court to fix a reasonable time for the appearance of the appellant or his counsel, as required by s. 278 Act X. of 1872, is an error which invalidates its proceedings.—24 W. R., Cr., 60.

169. When a criminal appeal has been rejected without hearing the appellant's Pleader and it is afterwards proved to the satisfaction of the Appellate Court that an adequate excuse has been made for the non-appearance of the Pleader, it is open to the Appellate Court to rehear the appeal on its merits.—7 Mad. H. C. Rep. 29.

S. 279.

170. In criminal cases, a complainant cannot claim as of right to be heard as a respondent on appeal. The matter is in each case in the discretion of the Court.—7 Mad. H. C. Rep. 42.

S. 280.

171. Circumstances under which the High Court will, on appeal by the prisoner, enhance the punishment under s. 280 Act X. of 1872. —*Queen* v. *Soffiruddi Palwar*, 13 B. L. R 23.

172. An Appellate Court can only deal with the sentences passed on the persons who actually appeal. It cannot alter a sentence passed on one who was jointly convicted but took no steps to appeal.—8 Mad. H. C. R. 7.

173. *Held* that a Session Judge has no power to mitigate a sentence passed upon a prisoner who has not appealed to him.—*Reg.* v. *Muliya Nana et. al.*, 5 Bom. H. C. R. 24.

174. Where an Appellate Court made an order under s. 280 Act X. of 1872, enhancing the sentence appealed from, without having served notice on the appellant, the order of enhancement was quashed as illegal.—24 W. R., Cr., 72.

of the family, a very different set of considerations presents itself. The dominion of man over external nature, his right over the actions of his neighbour arising from contract, may assume endlessly various forms. His personal relations as a husband, father, brother or caste-fellow are not only susceptible of infinite variation but touch his sensibilities in their tenderest points. In dealing with the substantive private law we place ourselves in the very midst of the actual life of the sentient beings who look to us for furtherance in happiness and prosperity. Every step we take is full of the peril of wounding some unknown susceptibility. The mass of people are incapable of proceeding *per saltum* to a recognition of the ultimate advantages of great changes which at the time jar on their traditional prejudices and reduce them to a state of puzzled uncertainty.

18. If, then, by means of additional laws we wish to contribute a new expansive force to Native society, we should, first of all, free ourselves from the fetters of a too exclusive devotion to our own somewhat narrow legal system. The work to be done calls for a wider survey, for a comparison of systems and a truly philosophical induction. The late Mr. Justice Willes insisted strongly on the advantages of such a method, even for English legislation. He argues for "a really well-considered Code . . . . embodying improvements suggested by a comparison of our own laws with those of other countries," which, as he truly says, "can hardly all be mistaken." When we see how one proposition after another insisted on by the great continental jurists has to force its way after years or generations of controversy into the body of English jurisprudence, we cannot but be struck with the narrowing effect of an almost purely deductive method confining professional genius to a range in no way commensurate with human nature, and obstinately refusing admission to any legal principle which cannot be proved needless by the possibility of referring it directly to something already admitted. When one sees the vehemence with which the continental jurists themselves contest some important points, a further lesson is learned of the limitation even of highly cultivated faculties. What fits the whole scope of expanding human capacities can be determined only by the profound insight of genius; but ordinary intelligence can pronounce with certainty on the insufficiency or unfitness of many rules for any people or any system except those in whose midst they have grown up.

19. How far, and in what form, the particular rules accepted in England are suited to this country and community is thus in every case

a question which must be met on grounds, not of mere prejudice or senseless imitation, but according to a just analysis of what is proposed and what are the conditions under which it is to operate. To answer the question aright, something more than mere juristic science must be brought to bear on it. There must be a competent knowledge of the existing written and unwritten law, intimacy with Native habits and modes of thought, a set of associations through which the mind of the inquirer is spontaneously affected with an emotion, or the reflex of an emotion, akin to that which will be on any occasion felt by the ordinary Mussulman or Hindu. A large degree of this responsive faculty is no doubt sometimes acquired by men of sympathetic temperament in the work of the Courts, but in general it exacts early and familiar relations between the Native and his would-be benefactor; it requires an intercourse kept up in varying positions through several years to enable the European to go outside himself and see how matters look from the purely Native point of view. It may not be right or safe to accept the view thus presented as conclusive; but it cannot be right simply to ignore it. Proceeding on a method of disdain some of our measures may by chance succeed; many of them must necessarily fail. We work in the dark, and our legislation, being founded on no appreciative insight into the moral nature of the Natives, can never become in its entirety a portion of their intellectual being. "Government," as Burke says, "is a practical thing made for the happiness of mankind, not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians;" while the true end of legislation is "to follow, not to force, the public inclination, to give a direction, a form, a technical dress and a specific sanction to the general sense of the community.* The experience of the world, the decay of superstitions, enable us now to go back with comparative intellectual freedom to really first principles. In pursuing this course, we come upon springs of thought and action common alike to Hindu, Mussulman and Christian. At these we should pause and appropriate all they can yield to us; employ the results with frugal skill, and, having thus established the base-line and some of the principal points of our system, leave the development of its details to time, to the sure germination of sound thoughts and to the action of the Courts, continually checked in any tendency to aberration by the constraining influence of great and conspicuous landmarks.

20. The principles, then, which we attempt to introduce in our legislation, and especially in a Code, should be comparatively few, care-

112. The law of marriage in general, and of nuptials in different forms; the regulations for the great sacraments, and the manner, primevally settled, of performing obsequies;

113. The modes of gaining subsistence, and the rules to be observed by the master of a family; the allowance and prohibition of diet, with the purification of men and utensils;

114. Laws concerning women, the devotion of hermits, and of anchorets wholly intent on final beatitude, the whole duty of a king, and the judicial decision of controversies,

115. With the law of evidence and examination; laws concerning husband and wife, canons of inheritance; the prohibition of gaming, and the punishments of criminals;

116. Rules ordained for the mercantile and servile classes, with the origin of those that are mixed; the duties and rights of all the classes in time of distress for subsistence; and the penances for expiating sins;

117. The several transmigrations in this universe, caused by offences of three kinds, with the ultimate bliss attending good actions, on the full trial of vice and virtue;

118. All these titles of law, promulgated by MENU, and *occasionally* the customs of different countries, different tribes, and different families, with rules concerning hereticks and companies of traders, are discussed in this code.

119. Even as MENU, at my request, formerly revealed this divine *Sástra*, hear it now from me without any diminution or addition.

CHAPTER II.

ON EDUCATION; OR ON THE SACERDOTAL CLASS, AND THE FIRST ORDER.

1. KNOW that system of duties, which is revered by such as are learned in the *Védas*, and impressed, *as the means of attaining beatitude*, on the hearts of the just, who are ever exempt from hatred and inordinate affection.

2. Self-love is no laudable motive, yet an exemption from self-love is not *to be found* in this world: on self-love is grounded the study of scripture, and the practice of actions recommended in it.

3. Eager desire *to act* has its root in expectation of some advantage; and with such expectation are sacrifices performed; the rules of

religious austerity and abstinence from sins are all known to arise from hope of remuneration.

4. Not a single act here below appears ever to be done by a man free from self-love; whatever he performs, it is wrought from his desire of a reward.

5. He, indeed, who should persist in *discharging* these duties without any view to their fruit, would attain *hereafter* the state of the immortals, and even in this life, would enjoy all the virtuous gratifications, that his fancy could suggest.

6. The roots of law are the whole *Véda*, the ordinances and moral practices of such as perfectly understand it, the immemorial customs of good men, and, *in cases quite indifferent*, self-satisfaction.

7. Whatever law has been ordained for any person by MENU, that law is fully declared in the *Véda*: for HE was perfect in divine knowledge:

8. A man of true learning, who has viewed this complete system with the eye of sacred wisdom, cannot fail to perform all those duties, which are ordained on the authority of the *Véda*.

9. No doubt, that man who shall follow the rules prescribed in the *Sruti* and in the *Smriti*, will acquire fame in this life, and, in the next, inexpressible happiness:

10. By *Sruti*, or *what was heard from above*, is meant the *Véda*; and by *Smriti*, or *what was remembered from the beginning*, the body of law: those two must not be oppugned by heterodox arguments; since from those two, proceeds the whole system of duties.

11. Whatever man of the three highest classes, having addicted himself to heretical books, shall treat with contempt those two roots of law, he must be driven, as an Atheist and a scorner of revelation, from the company of the virtuous.

12. The scripture, the codes of law, approved usage, and, *in all indifferent cases*, self-satisfaction, the wise have openly declared to be the quadruple description of the juridical system.

13. A knowledge of right is a sufficient incentive for men unattached to wealth or to sensuality; and to those who seek a knowledge of right, the supreme authority is divine revelation;

14. But, when there are two sacred texts, *apparently inconsistent*, both are held to be law; for both are pronounced by the wise to be valid and reconcilable;

15. Thus in the *Véda* are these texts: "let the sacrifice be when

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CALCUTTA HIGH COURT.

FULL BENCH.

THE 8TH DECEMBER 1879.

Present:

The Hon'ble Sir Richard Garth, Knight, Chief Justice, and the Hon'ble Louis S. Jackson, Charles Pontifex, G. G. Morris, and W. F. McDonell, K. C., Judges.

Case No. 115 of 1878.

Regular Appeal from a decision passed by the Subordinate Judge of Jessore.

J. R. RAINEY and others (Plaintiffs,) *Appellants,*

versus

NOBO COOMAR MOOKERJEE and others (Defendants), *Respondents.*

Majority—Limitation Act, IX. of 1871, *Section* 3*—Domicile.*

For the purposes of the Limitation Act, IX of 1871, no person, whoever he may be or whatever his domicile may be, is protected from the operation of the Act beyond the age of 18, and the three years of grace given by that Act.

Mr. Woodroffe and Mr. Gregory, for the *Appellants.*

Mr. Phillips and Baboo Gooroodass Banerjee, and Baboo Bungsheedhur Sen, for the *Respondents.*

The decision of the Full Bench was as follows :—

As the question referred to us in this appeal arises upon the issue of limitation, we think that it must be determined with reference to Act IX. of 1871, that being the Limitation Act which was in force at the time of the institution of the suit.

If the plaintiff, Isabella Rainey, came of age at 21, the suit is in time, having been brought within three years of her attaining that age. But if she came of age at 18, the suit is barred.

Now the third section of the Limitation Act of 1871 distinctly says that in that Act, unless there is something repugnant in the subject or context, minor means " a person who has not completed his age of 18 years."

There is no distinction here between persons of different races or nationality, or can any question arise, as far as we can see, of domicile or place of residence. We can only read the third section as meaning, that for the purposes of the Limitation Act of 1871, no person, who-

ever he may be, is protected from the operation of the Limitation Act beyond the age of 18, and the three years of grace given by that Act. As we decide this case upon the provisions of the Limitation Act, we think it unnecessary to consider the question of the plaintiff's domicile.

CALCUTTA HIGH COURT.

THE 19TH MAY 1879.

Before Mr. Justice Jackson, C. I. E., and Mr. Justice McDonell.

CHENI BASH SHAHA* (*Plaintiff,*)

versus

KADUM MUNDUL (*Defendant.*)

Limitation—Contract to pay by Instalments—Default in paying an Instalment of a Debt payable by Instalments—Act IX. of 1871—*Act XV. of* 1877, *sched. ii., art.* 75.

When a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs, under Act IX. of 1871 or Act XV. of 1877, from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver, and suspends the operation of the law of limitation, but merely allowing the default to pass unnoticed does not.

JACKSON, J.—We think this a very clear case; it must be determined with reference to the 75th article of the Limitation Act of 1877. At the time when the contract was entered into, the Act of 1871 was in force, of which, so far as concerns this case, the provisions were identical with those of the Act now in force.

By waiver in this case, we think, is meant a waiver of the condition by which in default in payment of any one instalment the whole amount unpaid become immediately payable. A waiver of that stipulation consists in the receipt of an instalment after due date, instead of insisting on payment in full. That is quite a different thing from an absolute sleeping on his rights. The creditor here has not waived the stipulation, but has simply allowed time to go on. The time, therefore, began to run from the first default.

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* *Vide* I. L. R, 5 Calc 97.

CALCUTTA HIGH COURT.

THE 25TH MARCH 1879.

Before Mr. Justice Birch and Mr. Justice Mitter.

JUSSODA KOOER* (*Plaintiff*,)

versus

LALLA NETTYA LALL (*Defendant*.)

Certificate—Guardianship—Mithila Law.

Under Mithila law the mother of a minor is entitled to a certificate of guardianship in preference to the father.

BIRCH, J. (Mitter, J., concurring).—In this case the Judge states that he is unable to grant a certificate, inasmuch as the witness called by Mussamut Jussoda admits that the father of the minor is alive, and, therefore, in the Judge's opinion, it would be unadvisable to grant a certificate of guardianship to the mother. The Judge appears to have overlooked the fact that this case is governed by the Mithila law, and that, under that law, the mother is the person to whom the certificate should be granted in preference to the father. The Judge's order must be reversed, and he must be directed to grant a certificate to Jussoda as guardian of the person of the minor and as manager of the minor's property. The appeal is allowed with costs.

MADRAS HIGH COURT.

THE 27TH NOVEMBER 1878.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

MODALATHA† (Defendant) *Appellant.*

Act X. of 1877, *s.* 584—*Construction—Second Appeal—Defendant.*

A defendant who obtains a judgment in his favor in the Court of First Instance, and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a rehearing, may under Act X. of 1877 present a second appeal against the decree of the Lower Appellate Court

Mr. Justice Kernon delivered a judgment admitting the memorandum of appeal.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. Section 584 allows a second appeal from all decrees passed in appeal unless

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* *Vide* I. L. R, 5 Calc. 43.

† I L. R, 2 Mad. 75.

otherwise provided in the co[illegible] other law. Though Section 587 declares that chapter 41 shall apply to second appeals as far as it may be applied, there is no prohibition in that chapter of a first or second appeal. It may be a question whether an appeal does not lie even from an *ex-parte* judgment, the restriction contained in Section 119, Act VIII. of 1859, being omitted in the corresponding section of the present code (108), but it is not now necessary for us to decide that question. It is true that Section 560 enables a respondent to move for a rehearing when the appeal is heard *ex-parte*, provided that he can satisfactorily account for his omission to appear at the hearing ; but this section is permissive and not mandatory. It is also true that an appeal is allowed from an order refusing a rehearing, but this may be, because the first Court of Appeal is also the final Appellate Court in questions of fact. The provisions of the present code seem to leave it to the party concerned to decide whether he ought to seek a rehearing or prefer a second appeal.

I would allow Mr. Shephard's application and admit the second appeal.

CALCUTTA HIGH COURT.

THE 17TH APRIL 1879.

Before Mr. Justice Jackson, C. I. E., and Mr. Justice McDonell, V. C.

BEHARI LALL MOOKERJEE* (*Plaintiff*,)

versus

MUNGOLANATH MOOKERJEE (*Defendant.*)

Limitation—Review—Application for, to be made within what time, and to whom—Beng. Act VIII. of 1869, *s.* 103—*Act IX. of* 1871, *s.* 6—*Act XV. of* 1877, *ss.* 6 *and* 12—*Act X of* 1877, *s.* 624.

Though by s. 6 of the Limitation Act, 1877, nothing in that Act affects the period of Limitation prescribed by any special or local law for any suit, appeal, or application, still the rules prescribed by that Act for computing the period of Limitation are applicable to such suit, appeal, or application. Section 6 of Act IX. of 1871, contrasted with s. 6 of Act XV. of 1877.

JACKSON, J.—The Judge of Hooghly, in making this reference to the Court, and in observing on the precedents which have been cited before him or brought to his notice, appears not to have remarked the change in the law introduced by s. 6 of the present Limitation Act. The corresponding section of the repealed Act IX. of 1871 declared that

* *Vide* I. L. R., 5 Calc. 110.

—"When by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of Limitation differing from that prescribed by this Act, is specially prescribed for any suits, appeals, or applications, nothing herein contained shall affect such law;" so that when by any special enactments, which continued in force, such as the Rent Act, any period of limitation differing from that prescribed by Act IX. of 1871 as prescribed, then the provisions of Act IX. were wholly inapplicable to such cases, and, therefore, the petitioner for review would be bound to present his application precisely within the time specified by the law in question.* But s. 6 of the present Act is in these terms:—"When by any special or local law, now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal, or application, nothing herein contained shall affect or alter the period so prescribed." So that, according to this section, the period prescribed by s. 103 of Beng. Act VIII. of 1869 remains unaltered, but the rules prescribed by the Limitation Act for computing the period of limitation are applicable. Therefore the party applying for review would be entitled to the benefit of the rules contained in s. 12 of the Act. At the same time it is not apparent that any useful purpose has been answered by making this reference, because the application is to review the judgment of Mr. Brett, who was the acting Judge of Hooghly in the month of September last. The application is made to Mr. Grant in the month of November, and as it will appear from a perusal of the petition which we sent for that purpose, that the application rests upon supposed errors of judgment. It would seem that s. 624 of the Procedure Code would bar the entertainment of the application by any Judge other than the Judge who delivered the judgment.

CALCUTTA HIGH COURT.

FULL BENCH.

THE 2ND FEBRUARY 1880.

Present :

The Hon'ble Sir Richard Garth, Knight, Chief Justice, and the Hon'ble Louis S. Jackson, Charles Pontifex, G. G. Morris and W. F. McDonell, V. C., Judges.

Case No. 1775 of 1878.

Appeal from a decision passed by the Judge of Dacca, affirming the decree of the Subordinate Judge of that district.

JOGGOBUNDHU MUKERJEE and others (Plaintiffs) *Appellants,*

versus

RAM CHUNDER BYSACK (Defendant) *Respondent.*

Symbolical possession—Limitation—Third parties—Act X. of 1877, *Section* 264.

Symbolical possession given to a decree-holder of immoveable property in the occupation of ryots as contemplated by section 264 of Act X. of 1877 gives him a fresh period of Limitation, it being equivalent to actual possession as between parties to the suit, and entitle him to maintain a suit for the recovery of the same within 12 years from the date of such possession. But as against third parties, such symbolical possession is of no avail.

Baboo Nollet Chunder Sen, for the *Appellants.*

Mr. Branson and Baboo Lall Mohun Dass, for the *Respondent.*

The judgment of the Full Bench was as follows :—

If we were satisfied that in the Mundol's case their Lordships of the Privy Council intended to decide the question which is now referred to us, it would, of course, have been unnecessary to consider the matter further.

But upon a careful perusal of their Lordships' judgment, and on referring to the facts as they appear in the copy of the printed book, we much doubt whether the point was really raised in that case or whether their Lordships intended to express any opinion upon it.

We have, therefore, now to decide the matter without reference to their Lordships' judgment ; and having considered the sections of the Code which bear upon it, and the somewhat contradictory decisions to which we have been referred during the argument, we have come to the conclusion that the question of law referred to us should be answered in the affirmative.

Sections 223 and 224 of the Code* point out the mode of executing decrees in suits for immoveable property; section 223 where the land is in the actual possession of the defendant applies; section 224, where it is in the occupation of ryots.

In the one case the delivery of the land is to be made by placing the plaintiff in direct possession. In the other the delivery is effected by the officer of the Court by going through a certain process prescribed by section 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendants. This is the only way in which the decree of the Court, awarding possession to the plaintiff, can be enforced; and as in contemplation of law both parties must be considered as being present at the time when the delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession.

As against third parties, of course, this symbolical possession, (as it is called) would be of no avail, because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think that the plaintiff would have 12 years from such dispossession to bring another suit.

One very conclusive test, as it seems to us, that the delivery thus effected under section 224 does really, in the eye of the law place the plaintiff in possession as against the defendant, consists in this :—That if mesne profits are awarded to the plaintiff, he is only entitled to them up to the time when delivery is given. This can only of course be explained upon the ground, that, at that time, the defendant's possession is considered at an end, and the transfer to the plaintiff becomes complete. We think, therefore, that the judgment of the lower Appellate Court, upon the question of limitation, must be reversed and that the case should be remanded to that Court to be tried upon its merits.

The costs in this Court will abide the result.

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* Act VIII. of 1859.

HIGH COURT, N. W. P.

THE 8TH JULY 1879.

Before Mr. Justice Spankie and Mr. Justice Straight.

HARSUKH* (*Defendant,*) *vs.* MEGHRAJ (*Plaintiff*)

Decree—What it is to contain—Act VIII. of 1859 *(Civil Procedure Code,) s.* 189*—Act X. of* 1877*, s.* 206.

Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought" without any specification in it as to the relief he sought by charging the property hypothecated, *held* that such a decree was a decree for money only, and did not enforce the charge on the property. Muluk Fuqueer Bakhsh *vs.* Manohur Das, (H. C. R., N. W. P, 1870, p. 29) followed.

SPANKIE, J.—In this case the facts were admitted. The only question for decision is, whether the original decree obtained by appellant charged the property in suit for the satisfaction of the amount decreed.

The Subordinate Judge held that the property was so charged. The suit was one to enforce a lien. The judgment declared the lien good and valid. The claim was decreed as brought. The Subordinate Judge allows that the decree was not properly prepared, but there can be no question as to what was granted by the decree. It was not a part but the whole of the claim which was decreed, and this included the enforcement of the lien against the property. The Subordinate Judge did not consider the precedent *Muluk Fuqueer Bakhsh* vs. *Lala Manohur Das* (1,) which was brought to his notice, to be applicable to the case. In appeal the Judge held that the words "decreed virtually" do not amount to a specific decree that the plaintiff may recover the amount of his claim by the sale of the property hypothecated. He therefore decreed the appeal and reversed the decision of the Subordinate Judge.

The defendant, appellant, relies upon the decision of the first Court.

The wording of the sections bearing upon decrees is the same both in Act VIII. of 1859, and Act X. of 1877, as regards the points which relate to the case before us. The particulars of the claim are stated in the body of the decree, the subject of dispute, but "the relief granted" is not specified clearly. The claim is "decreed virtually" is not a clear specification of the relief granted. In this respect I have no hesitation in agreeing with the Judge. The Subordinate Judge does not consider

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* I. L. R., 2. All. 345.

(1) H. C. R., N. W. P., 1870, p. 29.

that the case cited (1) is applicable to the present case. But in that case the plaintiff in a former suit had not confined himself to asking for relief in the shape of what is called a mere money-decree, he sought also to enforce his charge against the land. The decree, which was passed *ex-parte*, after reciting the substance of his plaint, was clearly confined to giving him a decree for the money against the person. The Court (Morgan, C. J. and Ross, J.) held that they were bound to give effect to the decree according to the plain meaning of the language used, and this clearly gave relief merely against the person for the debt. The Court added : " If the plaintiff, from negligence or other cause, omitted to prefer the portion of his claim which sought to charge the land, or, having preferred it, was content to accept an imperfect adjudication, or one which awarded him only a part of the relief claimed, he cannot now bring forward in a fresh suit matter which might well have been disposed of. The decree made was not questioned either in appeal or by review.

The principle upon which the ruling proceeds appears to be very applicable to this case, and to the decree in which the particulars of the claim are stated, and the suit was one in which the plaintiff certainly desired to enforce his lien against the hypothecated property, but the decree is silent in respect to his particular relief. It states that the claim is virtually decreed against the defendant. There is no addition of the words " by sale of the property hypothecated in the bond." The decree therefore was imperfect and did not give the relief asked for, and the plaintiff should have got it amended, or have applied for a review, or should have appealed against the decree in order to have it brought into agreement with the judgment.

A majority of the Court in Regular Appeal, No. 75 of 1873, decided by the Full Bench on 30th June, 1876 (1), held upon a reference to the Court at large that, in a case decided in accordance with a confession of judgment, in which the following words appear, " The whole of the property as entered in the deed will remain hypothecated and mortgaged till payment of the entire demand," but in which the operative part of the decree was one " for the amount claimed with costs and interest against the defendants, who have promised to pay the amount within two years, on their confession of judgment admitted by the plaintiff," the decree was merely a money-decree. One of the learned Judges who

(1) H. C. R., N. W. P., 1870, p. 29.

formed the majority observed: "It seems to me impossible to hold that it is more than a mere money-decree: the relief granted is money only, nor is it provided that the money may be realised by the sale of any particular property, by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and that its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction, but it is not competent to us to rule that it is other than a mere money-decree, in the terms in which it has been drawn."

We are, I think, bound to follow the opinion of the majority of the Full Bench in 1876. A judgment, however, of a Division Bench of this Court in *Azim-ullah Khan*, v. *Kishen Lal*, was shown to us in which the learned Judges took a different view, and one of them seems to have changed his opinion. In that case, according to the memorandum of appeal, the decree in words was to the effect that "the claim be decreed with costs and interest," and the Subordinate Judge held that in the decree there was no order respecting the enforcement of the lien, nor is there an order that the money would be realised by an auction-sale of the property. There was no order in the decree referring even in the most distant manner to the hypothecated property. The Subordinate Judge admitted that this might have been carelessness in preparing the decree, but considered that the decree-holder should have had it amended. In appeal the learned Judges held that the first Court "had rightly construed the decree to be not merely a money-decree, but a decree also for the enforcement of the lien, and the claim was for the recovery of the bond-debt, by the enforcement of the lien."

This decision is quite opposed to the opinion of the majority of the Court in 1876, and it may have been that the Subordinate Judge misapprehended what the decree did recite. The Munsif, however, admitted in his judgement that the word "kifalat" (pledge) had been omitted in the decretal order owing to an error on the part of the decree-clerk. The former decisions refer to the time when Act VIII. of 1859 was in force, but under the current Act X. of 1877, the wording of s. 206 is still more stringent; now it says that the "decree must agree with the judgment," words not found in the corresponding section of Act VIII. of 1859, and the section further provides means for the amendment of a decree, if it is found to be at variance with the

judgment, so as to bring it into conformity with the judgment. Appeals also are admissible under the new Act not only from decisions but from any part of them, so that every facility is offered for the correction of decrees. This being so, I think that we should not in any way show tenderness to any indifference on the part of a decree-holder, who consents to take a decree loosely drawn out, or which grants him incomplete relief, and in doing so is not in accordance with the judgment. It is not for us to construe the relief granted by the decree, by reference to the particulars of the claim. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. The decree which gave rise to the resent suit does not fulfil these conditions, and as it is expressed, it is in my opinion nothing more than a money decree against the defendant. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—I entirely agree in the views of Mr. Justice Spankie, which are in accordance with the opinion I entertained in a case of a similar kind involving like consideration, before Mr. Justice Oldfield and myself.

HIGH COURT, N. W. P.

THE 17TH APRIL 1879.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

SULTAN KUAR* (Judgment Debtor) *vs.* GULZARI LAL (Decree Holder.)

Execution of Decree — Sale of a money-decree—Act X. of 1877 *(Civil Procedure Code,) ss.* 166, 273.

Held that Act X. of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in s 273 cannot lead to its sale.

Held also that the last clause but one of s. 273 applies to other than money-decree.

Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provisions of first clause of s. 273 of Act X. of 1877 were applicable on principle.

PEARSON, J.—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree in s. 166 of Act X. of 1877, yet it is apparent from the provisions of s. 273 of the Act that the sale of a money-decree is not contemplated as

* *Vide* I. L. R, 2 All. 290.

the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

In our opinion the Judge is wrong in holding the last clause but one of s. 273 to be applicable in the present case. That clause applies to other than money decrees. Although the two decrees held by Gulzari Lal and Sultan Kuar respectively were not passed by the same Court, nevertheless as they are being executed by the same Court, the provisions of the first clause of the section are applicable on principle.

Our opinion may be communicated to the Judge in reply to his reference.

HIGH COURT, N. W. P.

THE 7TH MAY 1879.

Before Mr. Justice Pearson and Mr. Justice Spankie.

In the Matter of the Petition of MULO.*

Sale in execution of decree—Return of Purchase money to auction-purchaser—Act X. of 1877 *(Civil Procedure Code), s.* 315—*Act VIII. of* 1859 (*Civil Procedure Code*).

Where immoveable property was sold in the execution of a decree under the provisions of Act VIII. of 1859, and the auction-purchaser, having been subsequently deprived of such property on the ground that the judgment debtor had no saleable interest in it, applied under s 315 of Act X of 1877 to the Court executing such decree for the return of the purchase-money, *held* that the Court could entertain the application.

PEARSON, J.—The Judge's order seems to be a very right, just and proper one, with which we ought not to interfere, unless absolutely bound to do so. The proceedings commenced under Act VIII. of 1859 appear to have terminated with the sale. The application under s. 315 of Act X. of 1877 may be regarded as a new proceeding. We are not prepared to say that the Judge could not entertain the application preferred to him under the second clause of s. 315, Act X. of 1877; and we therefore decline to interfere, and dismiss this application with costs.

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* I. L. R., 2 All. 299.

HIGH COURT, N W. P.

THE 23RD MAY 1879.

Before Mr. Justice Pearson and Mr. Justice Spankie.

JAMNA * (*Plaintiff,*) *vs.* MACHUL SAHU (*Defendant.*)

Hindu Widow—Maintenance.

A wife is, under the Hindu law, in a subordinate sense, a co-owner with her husband ; he cannot alienate his property, or dispose of it by will, in such a wholesale manner as to deprive her of maintenance

Held **therefore, where a husband in his life-time made a gift of his entire estate leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance.**

PEARSON, J.—The lower Courts have disallowed the plaintiff's claim to be maintained out of her husband's estate given by him on the 8th January, 1850, shortly before his death, to the defendant, who was his nephew and partner in business, and who is stated in the deed of gift to have been adopted by him as a son, on the ground that, under the terms of that instrument, which bestows the whole estate on him without exception, reservation, or condition, she has no right to what she claims. I am not prepared to hold that the deed has been misconstrued, but the second ground of the appeal appears to me to be valid. A wife is, under Hindu law, in a subordinate sense, a co-owner with her husband, he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of maintenance; and I am therefore of opinion that the donee of the entire estate must be deemed to have taken and to hold it subject to her maintenance. This opinion is supported by the remarks at p. 366 of West and Bühler's Hindu Law of Inheritance and Partition, 2nd ed., and the Privy Council decision dated 30th November and 2nd December, 1859, in the case of *Sonaton Bysack* v. *Sreemutty Juggutsoondree Dassee* (1), and by the judgment of the Madras High Court dated 27th October, 1860, in which a sale of a piece of land by a Hindu was set aside on his wife's suit on the ground that it left her without maintenance.

The plea that provision was made for the maintenance of the plaintiff in the present case by her husband in the shape of an assignment of cash and jewels seems inconsistent with the terms of the deed, and the lower Court's finding that his entire estate was without exception or reservation given to the defendant, but the Courts below have

* *Vide* I L R, 2 All. 315.

(1) 8 Moore's Ind. App, 66.

not distinctly adjudicated upon it, I would direct the lower appellate Court to adjudicate on that plea, and, if it should disallow it, to proceed to determine whether Rs. 25 per mensem, or what monthly amount, would be a suitable allowance for the plaintiff's maintenance. The lower appellate Court should be instructed to submit its findings, when a week might be allowed for objections.

SPANKIE, J.—I agree with my learned and honourable colleague's proposal to refer the issue laid down above for determination by the lower appellate Court.

HIGH COURT, N. W. P.

THE 29TH MAY 1879.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

HARDEO DAS* and another (*Plaintiffs,*)

versus

HUKAM SINGH (*Defendant*).

Act X of 1877 (Civil Procedure Code), s. 210—Decree payable by Instalments.

Held that the provisions of s 210 of Act X. of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the property hypothecated by such bond (I. L. R., 2 All. 129, contrary decision). In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments.

PEARSON, J.—The appeal must, in our opinion, prevail. The lower Court has erred in applying the provisions of s. 210, Act X. of 1877, to this suit, which is not a mere suit for money but asks for the recovery of the amount of a bond-debt by the sale of the property hypothecated in the bond. S. 210 was not intended to enable the Courts to set aside and override such a contract as that on the basis of which the present claim is laid. The security over the hypothecated property which it gave for the payment of the debt would be of little value, if it could be so set aside and overridden. The plaintiffs are entitled to an award against the defendants of the principal sum, (Rs 12,000) with interest at the rate of twelve per cent. per annum to date of decree, and to the interest from the latter date to the date of realization at the rate of six per cent. per annum, and

* *Vide* I. L. R., 2 All. 320.

to their costs with interest thereon at the same rate; and to be empowered to recover the amount of the bond-debt by the sale of the hypothecated property. The decree of the lower Courts is modified accordingly; and the costs of this appeal are allowed.

CALCUTTA HIGH COURT.

THE 29TH JANUARY 1880.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

ISHAN CHUNDER BANERJEA,

versus

LOCHUN GOPE.

Review of Judgment of Court of Small Causes—Act X. of 1877, *Chapter XLVII.—Act XI. of* 1865*—Retrial.*

In applications of review of judgments of Court of Small Causes constituted under Act XI. 1865, the procedure laid down in the rules contained in Chapter XLVII of the Code of Civil Procedure (Act X. of 1877) is to be strictly followed, without reference to the procedure relating to new trials under section 21 of Act XI. of 1865.

JACKSON, J.—We think there can be no doubt upon this question. It appears that by the second schedule of the Code of Civil Procedure, Chapter XLVII., which deals with review of the judgment, is extended absolutely to Courts of Small Causes constituted under Act XI. of 1865. It is also true, as the Judge of Small Cause Court points out, that section 21 of Act XI. of 1865 has not been repealed. What will be the effect of the simultaneous retention of that section with reference to new trials is a question which we are not at present called upon to determine. The Legislature unequivocally expresses its intention that the procedure in review of judgment shall be applicable to Courts of Small Causes; and, if so, the Small Cause Court is, of course, at liberty to entertain an application of that sort, and in so doing must proceed strictly under the rules contained in that Chapter, and the procedure relating to new trials under section 21 of Act XI. is not to be mixed up with those rules.

CALCUTTA HIGH COURT.

The 29th January 1880.

Before Mr. Justice Wilson.

Sham Kissore Mundle (*Plaintiff,*)

versus

Shoshee Bhoosun Biswas (*Defendant.*)

Interrogatories, Application to strike out—Practice—Civil Procedure Code, (Act X. of 1877), *sections* 121, 125, 127 *and* 136—*Rules of Court.*

If interrogatories administered in a suit are scandalous, the Court may interfere by striking them out at any stage of the suit.

In other cases, where the party interrogated objects to the interrogatories administered, he may omit to answer them at his peril, and in that case it is open to the opposite party to apply to the Court under section 127 for an order requiring him to answer the interrogatories either by affidavit, or by *viva voce* examination as the Court may direct.

Where the questions are such as need not be answered under section 125, the party t whom they are administered may file an affidavit objecting to answer them.

In granting leave to a party to interrogate the opposite party, the Court has only to determine whether the case is a proper case for interrogatories and not what questions the party interrogated may be compelled to answer.

Wilson, J.—There is no doubt that the practice should be settled, because the procedure is new, and it is very important that there should be a settled practice. I do not entertain any doubt as to what practice is most convenient and most in accordance with the Civil Procedure Code.

The first section of the Code which deals with interrogatories is section 121, which says :—"Any party may at any time, by leave of the Court, deliver through the Court interrogatories in writing for the examination of the opposite party." Now what that section contemplates is, I think, (1) leave to interrogate, and (2) the service of the interrogatories through the Court.

Following on that section we have a rule of Court which makes the matter a little more clear. That rule is as follows :—" When interrogatories are ordered by the Court to be delivered under section 121 of the Code of Civil Procedure, two copies of each set of interrogatories shall be tendered to the Registrar, who, when the same are tendered by the plaintiff, shall forthwith, or when the same are tendered by the defendant, shall, on being satisfied that the defendant has filed a written statement, retain and file one of such copies and deliver the other copy for service to the attorney of the party tendering the interrogatories, or if there be no attorney, to the sheriff after adding at foot

thereof his signature and official designation. "Let this be served by the plaintiff's attorney [*or* the defendant's attorney, *or* the sheriff, as the case may be.]" Rule 274, Belchamber's Rules and Orders, p. 152.

Now I think that the section and the rule together clearly contemplate that it is the duty of the Court to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what questions the party to be interrogated should be compelled to answer.

In the present case that procedure seems to have been followed. Leave to interrogate was granted to the plaintiff. The order was, that "the plaintiff be allowed to interrogate."

In future, I think, these applications should be made in Chambers on Petition like other applications, and the order should be, that the applicant be at liberty to interrogate.

I think Mr. Bonnerjee is right when he says that the order stands on the same footing as any other order made in Chambers on *ex-parte* applications, and that the parties have a right to come into Court and ask that the order be reconsidered, and, if found to have been wrong, set aside. Therefore, if an order is made giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside if the case is one in which interrogatories ought not to have been allowed.

If the order was not wrong, and the case was a proper one for the administration of interrogatories, then other courses are open to a party objecting to the interrogatories administered. If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court no doubt may interfere at any stage. In other cases the party interrogated might omit to answer the interrogatories to which he objects at his peril. Then the course is for the interrogating party to apply to the Court under section 127 for an order requiring the other party to answer, or answer further, either by affidavit or by *viva voce* examination, as the Judge may direct.

Or the party interrogated may take a more cautious course; he may file his affidavit in answer, stating in it his objections to answer such questions as he objects to: and in this case the interrogating party if dissatisfied can apply under section 127.

Section 36 has been referred to, but I have no doubt the Court will not exercise the powers there given except in extreme cases.

It follows that in my judgment the proper course is, that if the defendant in this case desires to object to any of the interrogatories, he may abstain from answering or state his objection in his affidavit. If he does so object, then the plaintiff may take steps under section 127 to compel him to answer. The present application to disallow the questions is in my opinion wrong.

HIGH COURT, N. W. P.

THE 18TH JULY 1879.

Before Mr. Justice Oldfield.

EMPRESS OF INDIA,*

versus

THOMPSON.

Adultery—Act XLV. of 1860 (*Penal Code*), *s.* 497—*Compounding of Offences—Act X. of* 1872 (*Criminal Procedure Code*), *s.* 188.

N charged T with having committed adultery with his wife. On enquiry into the charge by the Magistrate, the case was committed to the Sessions Court for trial when T was convicted. T appealed to the High Court. After conviction N. and his wife were reconciled, and N. at the hearing of the appeal asked for leave to compound the offence. *Held*, that at that stage of the case sanction could not be given to withdraw the charge.

OLDFIELD, J.—Since the conviction by the Sessions Judge the complainant has taken his wife back to live with him, and has asked this Court to be allowed to compound the offence, a sanction which cannot be given at this stage of the proceedings, but looking to the existing relations between the parties and the fact that the prisoner Thompson has been in custody since the 15th May, the Court is of opinion that the punishment already undergone will suffice, and his release is directed.

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* *Vide* I. L. R., 2 All. 339.

HIGH COURT, N. W. P.

THE 2ND SEPTEMBER 1879.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA,*
versus
MANGU and others.

Act X. of 1872, (Criminal Procedure Code), ss. 272, 297—Arrest pending Appeal.

When an appeal has been preferred under s. 272 of Act X. of 1872, the High Court may order the accused to be arrested pending the appeal.

STUART, C. J.—I concur in the opinion expressed by Mr. Justice Oldfield. I also agree with Mr. Justice Straight in holding that under s. 297 of the Criminal Procedure Code the re-arrest of the accused for the purpose of the appeal may be made.

OLDFIELD, J.—I concur in the view taken by the learned Judges of the Calcutta High Court in *Queen* v. *Gobind Tewari* and others(1). The admission of an appeal revives the proceedings against the accused person who has been acquitted, and the Appellate Court, which has power, under s. 272 of the Criminal Procedure Code, to pass such judgment, sentence or order, as may be warranted by law, can, I apprehend, under the powers so conferred, compel the appearance of the accused person before it, and order his arrest.

Straight and Spankie, J. J, delivered separate judgments holding the above opinion.

CALCUTTA HIGH COURT.

THE 14TH MAY 1879.

Before Mr. Justice Morris and Mr. Justice White.

THE EMPRESS, *versus* MAGUIRE.*

Mutiny Act, s. 101—Jurisdiction of Civil (as opposed to Military) Courts—Offence committed bg British Soldier.

Section 101 of the Mutiny Act does not deprive the Civil (as opposed to Military) Court of jurisdiction over British soldiers committing offences within the territorial limits of those

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* I. L. R., 2 All. 340.

(1) I. L. R., 1 Calc. 281.

* Vide I. L. R, 5 Calc. 124,

Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. The section is merely permissive of a military trial being held.

White, J.—We have referred to the 101st section of the Mutiny Act (41 Vic., c. 10, A. D. 1878,) and are of opinion that that section (which is also to be found in the Mutiny Acts between 1873 and 1878) does not deprive the Civil Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. The 101st section simply provides that as regards civil offences committed by British soldiers serving in India or its dependencies, and at a distance of more than 120 miles from the Presidency-town, the offenders may be tried by a general court-martial, the appointment of which rests with the Commander-in-Chief. It appears to us that the section is merely permissive of a military trial being held. In this case the Court has got possession of the investigation of the offence, and the military authorities have not availed themselves of the alternative procedure of trying the offender by a general court martial. Under these circumstances, we think that the Court of the First Assistant Superintendent was a competent Court to commit the accused for trial on a charge of theft, and that the Court of the Sessions Judge and Chief Commissioner is a competent Court to deal with the case so committed, and we accordingly direct the latter Court to dispose of the case.

CALCUTTA HIGH COURT.

The 14th May 1879.

Before Mr. Justice Morris and Mr. Justice White.

The Empress, *vs.* Chunder Nath Dutt. *

Presidency Magistrates' Act (IV. of 1877,) *ss.* 82, 86, & 87 *expl.* 2—*"Revival of a Prosecution"—Examination of Witnesses.*

A "revival of a prosecution," as mentioned in expl. 2 of s. 87 of Act IV. of 1877, is not a continuation of the original prosecution from which the accused has been discharged. On the revival of the prosecution, all the witnesses on whose evidence the prosecution intend to rely must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo*.

White, J. (Morris, J., concurring).—The question raised by the reference of the Officiating Chief Magistrate is as to the procedure to be adopted in cases under Chap. 8 of the Presidency Magistrates' Act, when an accused person who has been discharged by

* *Vide* I. L. R., 5 Calc. 121.

the Magistrate under s. 87 of that Act, because there are no sufficient grounds for committing the prisoner to take his trial is at some subsequent time again prosecuted before a Magistrate for the same offence. The Act, in s. 82, states specifically the procedure to be applied when an accused person is brought before the Magistrate under Chap. 8, and no distinction is made between the cases of a first and that of a second prosecution for the same offence. The argument that on a second prosecution the witnesses who were examined on the first prosecution need not be examined again, but may be considered as giving evidence in support of the second prosecution, is based solely and entirely upon the circumstance that the Legislature, in expl. 2 of s. 87, has described the second prosecution as the "revival of a prosecution." I think the argument is not sound and has no sufficient foundation. The argument is in fact an inference from the use of the word "revival." The object of expl. 2 of s. 87 is to negative the supposition that a discharge would be a bar to a second prosecution for the same offence.

The explanation does not deal with the procedure which is to be adopted, if such second prosecution should take place. The fact that the Legislature has described the second prosecution as the "revival of a prosecution," does not in my opinion warrant the inference either that the evidence upon which the first prosecution is based is also revived, or that the procedure upon the second prosecution in to be different from that pointed out in s. 82. A further reason for this view is to be found in the provision for adjournment, which is contained in the same chapter of the Act. Under s. 86 a Magistrate has large powers of adjourning an enquiry for reasonable cause, but no adjournment can be for longer than fifteen days at a time. If upon a second prosecution after a discharge, the Magistrate is to treat the evidence that was given in the first prosecution as evidence upon the second prosecution, or as it is called in the reference before us—"take up the case for the prosecution where it was left when the prisoner was dischaged"—the Magistrate would in effect be acting as if he had adjourned the enquiry *sine die*, which he has no power to do. It cannot be supposed that the Legislature intended by the mere use of the word "revival of a prosecution" in expl, 2, s. 87, to give the Magistrate such a power, after it had carefully made provision by s. 82 against unlimited adjournments. In my opinion the proper reply to the question of the Officiating Chief Magistrate is that a "revival of a prosecution" as mentioned in expl. 2 of s. 87 is not a conti-

nuation of the original prosecution from which the accused has been discharged; and that upon the revival of the prosecution, all the witnesses on whose evidence the prosecutor intends to rely as justifying the committal of the accused must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo.*

CALCUTTA HIGH COURT.

FULL BENCH.

THE 8TH DECEMBER 1879.

Before Mr. Justice Garth, Chief Justice, and Pontifex, Morris and McDonell, J. J.

PITAMBUR SING (*Petitioner*) Appellant.

Adultery—Act I. of 1872, s. 50—Penal Code, s. 497—Marriage, Evidence of.

Where a marriage is an ingredient in an offence, as in adultery, bigamy and enticing away a married woman, it must be strictly proved.

The Judgment of the FULL BENCH:—We think it clear that in this case the evidence of the marriage is not sufficient to justify a conviction for adultery.

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (s. 50) seem to point out very plainly, that where the marriage is an ingredient in the offence, as in bigamy, adultery and the enticing away of married woman, the fact of the marriage must be strictly proved in the regular way.

CALCUTTA HIGH COURT.

Before Mr. Justice Tottenham and Mr. Justice Maclean.

In the Matter of SHEIKH DABU.

Act X. of 1872, s. 119.

Where the accused was charged under s 193, Penal Code, with having given false evidence, in that he denied having made certain statements which he was alleged to have made to the Inspector of Police, that officer was examined and merely put in two documents containing the statements alleged as the records of what had taken place. *Held*, that these documents being inadmissible in evidence under s. 119 of Act X. of 1872, evidence ought to have been given as to what was actually stated by the accused to the Inspector of Police.

JUDGMENT:—We think it impossible to sustain this conviction. Apart from the supposed evidence afforded by the Inspector of Police and the exhibits A and B, there is not enough to prove the offence

charged against the appellant. But exhibits A and B are not admissible in evidence, *vide* Section 119, Code of Criminal Procedure, and the Inspector of Police does not say *what* was stated to him by the accused. He merely refers to A and B as containing their statements. The conviction must, therefore, be set aside and the appellant Sheikh Dabu must be released.

CALCUTTA HIGH COURT.

THE 2ND FEBRUARY 1880.

Before Mr. Justice Morris and Mr. Justice Prinsep.

A. DAVID—*Petitioner.*

Act X. of 1872, *s.* 458—*Procedure—Evidence of one prisoner against another tried jointly.*

Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other.

MORRIS, J.:—In this case we think that the Judge in appeal was clearly in error in stating that it does not appear that the two men Mowla Bux and Arthur David were tried jointly.

On referring to the original record, we find that the prisoners Mowla Bux and Arthur David were tried together, the one as the thief of certain bottles, and the other as the receiver of those articles, knowing them to be stolen property. The Bench of Magistrates was, in our opinion, right in coming to the conclusion that the statement of Mowla Bux could not be used as evidence against David. The two prisoners were, strictly speaking, being tried together for different offences committed in the same transaction (see section 458, Criminal Procedure Code.) In such a trial it seems to us that it would be altogether improper and illegal to take one prisoner from the dock and examine him as a witness against the other prisoner; and, further, if the Court which tried the prisoners had not the power to admit the one prisoner as a witness against the other, it seems to follow as a necessary consequence that the Court of Appeal cannot have more power in this respect than the Court of Original Jurisdiction.

In this view we consider that there was a material error in the order of the Judge directing additional evidence to be taken by the examination of the prisoner Mowla Bux as a witness. We therefore cancel his order, and direct that the record be returned to the Sessions Judge in order that he may decide the appeal upon the evidence as it stands on the record.

Correspondence.

S. 311, CIVIL PROCEDURE CODE.

To the Editor of the "Legal Companion."

Dear Sir,

I shall feel exceedingly obliged if you kindly give publicity to the following letter, with an expression of your learned opinion.

Z has got a joint and several decree against A, B, C and D who are men of different castes and who hold their respective properties separately. In the execution of the said decree, the properties of the judgment-debtors A, B, C and D were attached and sold. A few days after the said sale, B put in a petition under S. 311, C. P. C. alleging that the said sale was irregularly conducted and praying for its cancelment. Counter-petitions in behalf of the judgment-creditor and the auction-purchasers were filed to the purport that B, as one of the judgment-debtors, has no right to claim the cancelment of the sale of the properties belonging to the other judgment-debtors but that he can claim a resale of his *own* property only under S. 311, C. P. C., provided he can prove material irregularity in publishing or conducting the sale. The District Munsiff disallowing the objections made in behalf of the judgment-creditor as well as the auction-purchasers decided that the petitioner has a right to claim the cancelment of the sale of the properties belonging to all the judgment-debtors on equitable principles, as the judgment-debtors A, C and D were collusive with the decree-holder. Counter-petitioners' vakil argued that there was no need for the Court to go to Equity when the law is so clear on the subject, S. 311, C. P. C. laying down that the decree-holder or *any person whose immoveable property has been sold* may apply to the Court to set aside the sale on the ground of irregularity in publishing or conducting it. I think that, though all the judgment-debtors but B were collusive with the judgment-creditor, the judgment-debtor B has no right to apply for a resale of A, C and D's properties on the ground that he would suffer by their being collusive with the decree-holder. The remedy for the judgment-debtor B lies only in a regular suit for contribution and not under S. 311, C. P. C. I wish to know whether I am right or not.

Bezwada,
29th March, 1880.

Yours truly,*
A Pleader.

* Yes, B appears to have no remedy under s. 311. See 2 W. R., Mis., 13; 24 W. R. 452.—Ed., *L. C.*

the systematic action of the Legislature, taking all appreciable conditions into account and aiming constantly at reducing the law not only to substantial accordance with actual necessities, but to the most simple, consistent and intelligible form.*

15. The work, moreover, must be one of cautious discrimination as well as of organization. The marked characteristic of the English law, in spite of a much larger infusion of the Roman system than our lawyers are, or were, willing to admit, is its insularity, its shrinking from general principles, its bit-by-bit growth on the results of particular cases. This empirical process has caused our law, no doubt, to grow with our growth, to mirror our history and to fit the peculiar stamp which the national character has received from our antecedents and surroundings. Moreover, a body of decisions has been collected in the reports, greatly outnumbering even the 30,000 *responsa prudentum* which Tribonian and his colleagues compiled at the bidding of the Emperor Justinian. Treated in a really scientific spirit, these decisions should be of inestimable value to the jurist and legislator. They are so many experiments which even in their not infrequent failure are in the highest degree instructive. But it must be said that when read without the aid of wide generalizations, and without the control of dominant notions drawn from the necessary relations of organized society, they may be a clog to progress and a means of almost infinite divergence from the track along which society is destined to move in the coming generations. It needs at times a Mansfield and a Cockburn to break

* Inaction on the part of the Legislature retards but does not arrest legislation. In the absence of enactments the judge makes law declaring what is the customary law, and what rules regulate rights not governed by customary law.

Beyond his own experience the judge must look for materials to the suitor who is interested to secure a particular decision rather than the accurate ascertainment of a usage or the establishment of sound principles ; who frequently lacks the means requisite to procure such proof as may be available or to retain a competent advocate. In the ascertainment of the customary law, then, the Legislature has ordinarily greater facilities than the Courts. A proposed law is published. Information can be obtained from the best sources and tested by the experience of individual members, who bring to the discussion of the proposed law experience acquired in the different districts of the empire or province. It may happen, but it must happen less frequently than is possible with the imperfect machinery of Courts of justice, that customary law is rejected where it should be recognized, or recognized where proof is inadequate.

In legislating on subjects not governed by customary law, the Legislature has again this advantage over the Courts, that before it arrives at a decision its proposals are published, and criticism from all parts of the empire invited and weighed.

the shackles of precedent, to go back to first principles, and to educe from them results which shall place the law once more abreast of the novel and extended needs of a time when every day brings forth some change.

16. This law, however, so isolated, so special, so indifferent to aught but a practical grasp of the legal relations which a single society presents for discussion, we must of necessity make the basis in a great measure of the law of India. It may serve the purpose; but it is certain that the good will be mixed in a needless degree with evil unless it be used with prudence and sagacity. Those peculiarities which adapt it best to England are in some respects disqualifications in India. From amid the mass of precedents and proximate rules of the practical lawyer, the Indian legislator, if his work is to be beneficial and enduring, must seize the central and governing idea. He must compare it with the results arrived at as to the same class of relations under other systems. If he finds a general accordance between them, he may safely proceed to consider how far the special circumstances of the country and the people for whom he has to legislate admit, repel, or qualify the application of an apparently universal principle. Hindu society has its own laws of unmeasured antiquity. It has its religion closely interwoven with those laws. It has the customs which that religion consecrates and springing fresh from the nature of the people. To ignore these facts is to invite failure. It is a living body that we have to deal with, identical in some respects with others of the same species, but with its individuality and its need for individual treatment as well marked as our own national character.

17. It is true that in the sphere of the criminal law and of procedure successful steps have been taken in legislation, governed to a certain extent by English analogies. But, if scrutinized, these experiments prove rather the necessity of recasting the materials of the English law than the expediency of adopting them undigested, unassayed and unmodified. The grounds of penal legislation are much the same everywhere. Murder, theft, arson, forgery, are essentially identical wherever a possibility of committing them exists. No serious difficulty is found in drawing up parallel tables of equivalent crimes for the purposes of extradition-treaties. Procedure, again, is a merely mechanical process for getting the parties to litigation and their witnesses before the Courts, for securing a fair hearing, and for giving effect to the Court's command. But when we come to the laws of property and

ACT IX. OF 1880.

THE BOMBAY CIVIL COURTS ACT, 1880.

Passed by the Governor-General of India in Council.

[*Received the Governor-General's assent on the 30th April,* 1880.]

AN ACT TO AMEND THE BOMBAY CIVIL COURTS ACT, 1869.

Preamble.

Whereas it is expedient to empower the Governor of Bombay in Council to fix and, from time to time, to alter the local limits of the ordinary jurisdiction of the Subordinate Judges appointed under the Bombay Civil Courts Act, 1869; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Bombay Civil Courts Act, 1880";

Commencement.

and it shall come into force at once.

Insertion of a new section after section 22 of the Bombay Civil Courts Act.

2. In the said Act, after section 22, the following section shall be inserted:—

Power to fix local limits of jurisdiction of Subordinate Judges.

"22A. The Governor of Bombay in Council may, by notification in the official Gazette, fix, and, by a like notification, from time to time alter, the local limits of the ordinary jurisdiction of the Subordinate Judges."

Limits already fixed to be deemed to have been fixed according to law.

3. All orders issued by the Governor of Bombay in Council previous to the passing of this Act, fixing or altering the local limits of the jurisdiction of a Subordinate Judge, shall be deemed to have been issued in accordance with law.

Note.

The following statem ent of Objects and Reasons appeared in the *Gazette* of *India,* Part V., dated the 31st January 1880 under the Bill to amend the Bombay Civil Courts Act, 1869, which was introduced into the Council of the Governor-General of India on the 23rd January, 1880:—

Statement of Objects and Reasons.

The Government of Bombay has lately represented that the repeal of section 30 of the Bombay Civil Courts Act, 1869, by the Repealing Act, 1876, has deprived that Government of a power it formerly possessed under that section of from time to time altering the limits of the local jurisdiction of the Subordinate Judges. It seems to the Government of India that the section in question rather assumed the exis-

tence of such a power than conferred it; but, as it is quite clear that the Local Government should possess such a power, the present Bill has been prepared to confer it. It merely adds to the Bombay Civil Courts Act, 1869, a section conferring power on the Governor of Bombay in Council to fix and alter the local limits of the ordinary jurisdiction of the Subordinate Judges, and validates such orders as may have already been issued fixing or altering such limits.

WHITLEY STOKES.

The 3rd January, 1880.

ACT X. OF 1880.

INDUS VALLEY STATE RAILWAY LANDS ACT.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 21st May,* 1880.]

AN ACT TO DECLARE THE LAW IN FORCE IN CERTAIN LANDS ANNEXED TO THE MULTAN DISTRICT.

Preamble.

WHEREAS the lands occupied by the Indus Valley State Railway, and the works, premises and stations thereof, within the limits of the Bahawalpur State, which have been ceded to the British Government in full sovereignty by that State, have been declared by the Governor-General in Council to be subject to the Lieutenant-Governorship of the Panjab, and have by the Lieutenant-Governor of the Panjab been annexed to the Multan District;

and whereas it is expedient that the law in force in the said lands should be the same as the law in force in the Multan District; It is hereby enacted as follows:—

Enactments in force in Multan District to apply.

1. All enactments which, on the second day of September, 1879, were in force in the Multan District and not in the said lands shall be deemed to have come into force in the said lands on that day.

Note.

The tract of land in the Bahawalpur State occupied by the line and premises of the Indus Valley State Railway was in 1872 ceded by that State to the British Government in full sovereignty. This tract has, by a notification of the Governor-General in Council of the 14th July 1879, been declared to be subject to the Lieutenant-Governorship of the Panjab, and, by a notification of the 2nd September, issued under the provisions of Act VI. of 1867, the Lieutenant-Governor of that Province has included it within the limits of the Multan District. Hence, in order to make the law throughout the district the same, the above Act has been passed.

88. To *Brahmens* he assigned the duties of reading the *Veda*, of teaching it, of sacrificing, of assisting others to sacrifice, of giving alms, *if they be rich*, and *if indigent*, of receiving gifts:

89. To defend the people, to give alms, to sacrifice, to read the *Veda*, to shun the allurements of sensual gratification, are, in a few words, the duties of a *Cshatriya:*

90. To keep herds of cattle, to bestow largesses, to sacrifice, to read the scripture, to carry on trade, to lend at interest, and to cultivate land are *prescribed or permitted* to a *Vaisya :*

91. One principal duty the supreme Ruler assigns to a *Sudra ;* namely, to serve the before-mentioned classes, without depreciating their worth.

92. Man is declared purer above the navel; but the self-creating Power declared the purest part of him to be his mouth.

93. Since the *Brahmen* sprang from the most excellent part, since he was the first born, and since he possesses the *Veda*, he is by right the chief of this whole creation.

94. Him, the Being, who exists of himself, produced in the beginning from his own mouth, that, having performed holy rites, he might present clarified butter to the Gods, and cakes of rice to the progenitors of mankind, for the preservation of this world :

95. What created being then can surpass Him, with whose mouth the Gods of the firmament continually feast on clarified butter, and the manes of ancestors, on hallowed cakes?

96. Of created things, the most excellent are those which are animated; of the animated, those which subsist by intelligence; of the intelligent, mankind ; and of men, the sacerdotal class;

97. Of priests, those eminent in learning; of the learned, those who know their duty; of those who know it, such as perform it virtuously; and of the virtuous, those who seek beatitude from a perfect acquaintance with scriptural doctrine.

98. The very birth of *Brahmens* is a constant incarnation of DHERMA, *God of Justice ;* for the *Bráhmen* is born to promote justice, and to procure ultimate happiness.

99. When a *Bráhmen* springs to light, he is born above the world, the chief of all creatures, assigned to guard the treasury of duties, religious and civil.

100. Whatever exists in the universe, is all in effect, *though not in*

form, the wealth of the *Bráhmen*; since the *Bráhmen* is entitled to it all by his primogeniture and eminence of birth:

101. The *Bráhmen* eats but his own food, wears but his own apparel: and bestows but his own in alms: through the benevolence of the *Bráhmen*, indeed, other mortals enjoy life.

102. To declare the sacerdotal duties, and those of the other classes in due order, the sage MENU, sprung from the self-existing, promulged this code of laws:

103. A code which must be studied with extreme care by every learned *Brahmen*, and fully explained to his disciples, but *must be taught* by no other man *of an inferior class*.

104. The *Brahmen* who studies this book, having performed sacred rites, is perpetually free from offence in thought, in word, and in deed:

105. He confers purity on his living family, on his ancestors, and on his descendants, as far as the seventh person; and He alone deserves to possess this whole earth.

106. This most excellent code produces every thing auspicious; this code increases understanding, this code procures fame and long life; this code leads to supreme bliss.

107. In this *book* appears the system of law in its full extent, with the good and bad properties of human actions, and the immemorial customs of the four classes.

108. Immemorial custom is transcendent law, approved in the sacred scripture, and in the codes of divine legislators: let every man, therefore, of the three principal classes, who has a due reverence for the *supreme* spirit *which dwells in him*, diligently and constantly observe immemorial custom:

109. A man of the priestly, military, or commercial class, who deviates from immemorial usage, tastes not the fruit of the *Veda*; but, by an exact observance of it, he gathers that fruit in perfection.

110. Thus have holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all piety, good usages long established.

111. THE creation of this universe, the forms of institution and education, with the observances and behaviour of a student in theology; the best rules for the ceremony on his return from the mansion of his preceptor;

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CALCUTTA HIGH COURT.

THE 18TH MARCH 1880.

(Before the Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice R. Mitter.)

MUSSAMAT RAM KOWER (Plaintiff) *Appellant,*

versus

MUSSAMAT PUNA KOWER and MUSSAMAT RHATAN KOWER (Defendants) *Respondents.*

Barristers—Vakeels—Attorneys—Special terms with Clients.

If a barrister takes a brief without a fee and without informing his client that the fee must be paid before he attends to the case, he cannot with propriety recede from it without due notice to his client, upon the ground that the fee is not paid. But he is undoubtedly entitled, if he pleases, to insist, when the brief is delivered, upon the prepayment of the fee, and in a large number of cases it would not only be *imprudent*, but *improper*, for him to accept briefs upon other terms, because to accept them, and to do the work in those cases, without the fee being paid, would be practically to do a great injustice to the rest of the profession, by knowingly accepting briefs and acting for clients without any remuneration whatever.

By the law now in force in this country, a vakeel's ordinary duties combine those both of an attorney and an advocate. There is no reason why a vakeel should not, by special agreement with his client, insist upon the payment of his fees before the case is argued. It is obvious that if he were debarred from making such an agreement he might frequently be placed in a very unfair position. He might be compelled to expend much valuable time and labor in the preparation and argument of an important case, at the risk of never being paid his fees at all, or at any rate of being driven to recover them by suit against a dissatisfied or insolvent client.

In the absence of any special agreement an attorney in England is bound to conduct a cause to its completion; but there is nothing to prevent an attorney from making special terms with his client so long as those terms are reasonable and proper; and an attorney is undoubtedly entitled, (apart from any special agreement), to discontinue the conduct of a cause if, after due notice to his client, the latter does not provide him with the necessary funds for carrying on the suit. See Vansandan *vs.* Brown, 9 Bingham's Reports, 402).

Mr. M. Ghose and Mr. M. P. Gasper for the *Appellant.*

Mr. C. Gregory and Mr. H. E. Mendies for the *Respondents.*

Garth, C. J., (*Mitter, J.* concurring.) This is an application to restore to the paper an appeal No. 294 of 1877, which we dismissed on the 25th of February last, as no one appeared to argue the case for the appellant.

When the case was called on, Baboo Mohiny Mohun Roy informed us that he had been engaged in the case for the appellant, but that he had not received instructions; and on our asking him whether he wished to apply to postpone the case, he said he had not been instructed to do so.

Mr. Mona Mohun Ghose then applied on the 22nd of March upon an affidavit of the mooktear who acted for the appellant, praying that the case might be restored, upon the ground that it had been struck out for no default of the appellant herself, and that the vakeels who were retained had been guilty of a breach of duty in not arguing the case when it was called on.

We then granted a rule, calling upon the respondent to show cause why the case should not be restored, and, as desired, that certain letters which had passed between the mooktear and his client should be brought before the Court. Accordingly, the rule came on to be heard on the 11th March. The letters have been produced, and from the affidavit of the mooktear and the other materials which we have now before us, the facts of the case appear to be these.

So long ago as October 1877, the mooktear, Baney Prosad, had engaged two vakeels, Babu Mohini Mohun Roy and Babu Sreenath Banerjee, to argue this appeal; the fee to be paid to them was Rs 700 to Babu Mohini Mohun, and Rs. 350 to Babu Sreenath. About half of those sums was in fact paid in advance; and the mooktear distinctly says that the understanding was that the remainder should be paid to them before the hearing of the appeal.

It then appears that on the 4th of February last, the mooktear wrote to the appellant's brother, who acted for her, (she herself being a purda nasheen lady) informing him that the case was down for hearing before the 5th Bench and would probably not come on for some time; and then again on the 7th of February, informing him that the case would be heard by this Bench, probably about the 16th of February, and begging him to send the fees with all despatch. This request was repeated with more or less urgency in subsequent letters, and it would appear from the answer of the appellant's brother that he was about to start for Calcutta himself; that he was trying to raise the required sum for fees and that he eventually went to Patna for that purpose. But meanwhile it seems that the appellant herself was raising other money at Nasirgunge, where she resided, and if we are to believe the mooktear's affidavit. which is in this respect uncontradicted, the money re-

quired to pay the fees was on its road to Calcutta on the day when the case was called on, the 25th of February, and actually arrived here on the evening of that day.

Under these circumstances, it has been strongly urged upon us by Mr. Ghose on behalf of the appellant, that the two vakeels who had been engaged were guilty of a direct breach of duty in not appearing and arguing the appeal. He contended that even supposing the agreement to have been that the fees were to be paid before the hearing, the vakeels were not justified in the course they took, especially as they had reason to believe that the money was actually on its way to Calcutta. He argued in the first place, that the arrangement disclosed by the mooktear's affidavit was not sufficiently explicit to make the pre-payment of the fees a condition precedent to the obligation of the vakeels to argue the appeal; and in the next place, that, whatever the agreement may have been, the vakeels were bound by the law of this country, and by the rules of their profession, to appear and plead, whether their fees were paid or not. In aid of this argument, he alluded to what he stated to be the law of England, that an attorney there, who undertakes to conduct a cause for his client, is bound to carry out the proceedings to their completion.

No doubt Mr. Ghose is so far right that in the absence of any special agreement an attorney in England is bound to conduct a cause to its completion; but there is nothing, so far as I am aware, to prevent an attorney from making special terms with his client so long as those terms are reasonable and proper; and an attorney is undoubtedly entitled, (apart from any special agreement), to discontinue the conduct of a cause if, after due notice to his client, the latter does not provide him with the necessary funds for carrying on the suit. See Vansandan v. Brown, 9 Bingham's Reports, 402. But it must be borne in mind, that, by the law now in force in this country, a vakeel's ordinary duties combine those both of an attorney and an advocate, and although any rule which the vakeels of the High Court may make amongst themselves may not be binding upon their clients unless the latter are duly informed of it, I certainly am unable to see any reason why a vakeel should not, by special agreement with his client, insist upon the payment of his fees before the case is argued. It is obvious that if he were debarred from making such an agreement he might frequently be placed in a very unfair position. He might be compelled to expend much valuable time and labour in the preparation and argument of an important case, at the

risk of never being paid his fees at all, or any rate of being driven to recover them by suit against a dissatisfied or insolvent client.

Our attention was called by Mr. Ghose to the case of Gopeenath Mudduck, 14 Weekly Reporter, page 7, in which it appears to have been stated by Mr. Justice Phear, with the concurrence of Mr. Justice Dwarkanath Mitter, that the acceptance of a vakalutnamah should always be unconditional, and that vakeels should be bound to argue their client's case, whether their fees are paid or not.

In consideration of this view, Mr. J. Phear also stated : "In England, a barrister who accepts his client's brief has no right to insist upon his fee being paid, before he attends to the case." That expression of opinion does not seem to have been strictly necessary for the purposes of the decision ; nor is it necessary for us, in deciding upon this application, express a contrary opinion. If it were so, I should certainly be disposed to refer the question to a Full Bench, because I am not prepared to admit the correctness either of the law of England or this country as laid down by the learned Judges on that occasion.

I have myself had a pretty long experience at the Bar in England, and I consider it a great mistake to suppose that a barrister may not, both as a matter of right and of professional propriety, insist upon the payment of his fee before he reads his brief or pleads his client's cause. I have acted upon that principle myself ; and I know that many of the most eminent men in the profession have constantly done the same.

Of course, if a barrister takes a brief without a fee and without informing his client that the fee must be paid before he attends to the case, he cannot with propriety recede from it without due notice to his client, upon the ground that the fee is not paid. But he is undoubtedly entitled, if he pleases, to insist, when the brief is delivered, upon the prepayment of the fee, and in a large number of cases it would not only be *imprudent*, but *improper*, for him to accept briefs upon other terms, because, to accept them, and to do the work in those cases, without the fee being paid, would be practically to do a great injustice to the rest of the profession, by knowingly accepting briefs and acting for clients without any remuneration whatever.

But to return to this particular case. We see no reason for imputing any blame, as we are urged to do by Mr. Ghose, to either of the vakeels who were engaged in the appeal, and indeed, it would be unfair that we should do so without giving those gentlemen an opportunity of being heard in their own vindication.

We see every reason to believe, upon the mooktear's own shewing, that by the terms of the arrangement between him and the vakeels, they were to be paid their fees in full before the hearing of the appeal; and having regard to the correspondence, it appears pretty plainly that the appellant herself, and her brother who acted for her, were perfectly aware of this. They seem to have done their best to procure the money, and that it was only through an accident that it did not arrive here in due time.

This, in itself, we consider a sufficient ground for restoring the appeal, without throwing any blame upon the vakeels. One point, however, we think we ought to mention, which has struck us forcibly during the argument, namely, that if there was really good reason, as it appears there was, for believing that the money was on its road, the proper course clearly was, to apply to this Court for a postponement. But this, it seems, the mooktear never thought of, and the vakeels were not asked to make any such application.

For this omission the mooktear would appear to be responsible; and if his client had suffered any substantial injury in consequence, it seems to us, as at present advised, that the mooktear would have been answerable to his client.

The only order that we now propose to make is, that the appeal be restored.

The appellant must pay the costs of this application, and we fix the pleader's fee at 3 gold mohurs.

CALCUTTA HIGH COURT.

THE 18TH JULY 1879.

(Before the Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Pontifex.)

JOGENDRONUNDINI DASSEE, Wife, *(Appellant,)*

versus

HURRY DASS GHOSE, Husband, *(Respondent,)*

and the CROSS SUIT.

Husband and Wife—Conjugal Rights—Husband's Adultery and Cruelty—Condonation.

As a matter of law, a suit for the restitution of conjugal rights may be maintained by a Hindu in this country.

Where it was found that the husband lived a very profligate life, indulged habitually in wine and spirits, was in the habit of consorting openly with prostitutes, and ill-treated and threatened his wife, with knives and other weapons in such a way as to induce very natural apprehensions on her part for her own personal safety, and consequently the wife left her husband's house and went to live with her mother, under the protection of her own family, but here the husband visited her and through the wise and proper mediation of her own relatives, a reconciliation, to all appearance took place and the result of this intercourse was that she became with child, *held* that this conduct of the wife, unexplained, is certainly very cogent evidence that she had condoned his previous conduct and that if, in this state of things, the husband had requested her to return to his house and she had refused to do so, he would have been entitled to bring a suit against her for the restitution of his conjugal rights.

Mr. Jackson and Mr. Bonnerjee, instructed by Messrs. Swinhoe & Co., for *Appellant.*

The Advocate General and Mr. Bonnaud, instructed by Mr. Wilson, for the *Respondent.*

These were two suits which were amalgamated in the Lower Court, and heard together. In the first suit, the husband sued for restitution of conjugal rights, and in the second, the wife sued for maintenance against her husband.

The husband in his plaint stated, that he was married to the defendant in November 1868, that there had been issue of the marriage only one son, named Dhurmodoss Ghose, that in July 1876 the defendant, with his consent, went to pay a visit to her brother, Mohendro Coomar Dutt, and that he, the plaintiff, occasionally went to live in the same house. In July 1877, he, being desirous of having his wife back at the house of his father, Lokenath Ghose, where he and the defendant had continually lived, asked his wife to return to him, but she refused to do so. He then, through his attorney, wrote to her a letter on the 10th of July 1877, in which he again requested her to return to him, and, further, gave her notice that if she refused to comply with his request, he would be compelled to bring a suit against her for restitution of conjugal rights.

The defendant replied to the above through Messrs. Swinhoe and Co. on the 12th of July 1877, in which letter she stated that it was on account of her husband's previous cruel treatment towards her that compelled her to leave his house, and that, unless some substantial guarantee were given to her that he would not ill-treat her, she would not consent to return to him.

On the 10th of August 1377, the plaintiff replied again, by attorney, to his wife's letter, and in his reply denied the allegation of

cruelty, and informed her that, should she return to him, she might rest assured that he would receive and treat her kindly and properly; but that if she would not return he would be forced to assert his right to have her back in a court of law. As no notice of this letter was taken by the wife, and as she still refused to go back to him, the plaintiff was compelled to bring this suit against her for restitution of his conjugal rights.

The defendant, in her written statement, alleged, that about the beginning of May 1872, the plaintiff, whose education had been greatly neglected, and who had been in the habit of drinking wines and spirits of European manufacture, and of eating food cooked in hotels kept for the use of Europeans, had given way to drinking to excess, and would, whilst under the influence of drink, beat and ill-treat her in a very heartless manner; but believing that by her influence she might be able to break him of the bad habits he had contracted, she did not then leave him. But in spite of all her endeavours to reform him, which continued for upwards of three years, she entirely failed, and, his ill-treatment and cruelty increasing in severity, she at length, wholly wearied in body and mind, and being afraid of her life, left him and sought for refuge in her mother's house, where she is still residing. As instances of his acts of cruelty, in the same year 1872, the plaintiff, when living in his father's house, with a total disregard for all decency, introduced on several occasions women of disreputable character into her sleeping apartments, and thus compelled her to remove to others, grossly insulting her thereby and causing her great inconvenience, and on her remonstrating with him for such improper conduct, he abused and beat her. She then proceeded to her mother's house, but in January 1873, on his repeated promises to amend, she returned to him.

In April 1873, the plaintiff removed the defendant from his father's house, and took her to a hired house in Durjeeparah lane, where they resided till December 1873. Whilst so living in this house, the plaintiff would constantly pass his time in the company of women of bad character, whom he would bring into the outer apartments of the house. He would on several occasions entirely absent himself from the house, and would return at intervals of two or three days.

On one occasion the plaintiff so insulted, abused, and beat the defendant, that she resolved to commit suicide, and her attempt to do so would have been successful but for the timely arrival of the plaintiff's sister, Jogesh Mohiney Dassee, and his nephew Bhootnauth Dutt.

In January 1874, the plaintiff and the defendant returned to the house of the plaintiff's father, but shortly afterwards the defendant went to the house of her mother in order to be confined, and she stated that the plaintiff did not take the slightest notice of her while she was in this delicate condition, and did not take any steps whatever to provide for the necessary expenses attendant on her confinement, all which expenses were defrayed by her mother. The plaintiff would occasionally come to the house, but whenever he did come he was in a state of intoxication.

In November 1874, the defendant went back to the house of the plaintiff's father, but the conduct of the plaintiff towards the defendant was in no way altered for the better. Instead of his cruel behaviour abating, it increased in violence. On one occasion, in April 1875, without the slightest provocation given to him, he pursued her with a large knife and threatened to take her life. Fortunately, however, she had time to escape and take refuge in the private apartment of a member of the family of the plaintiff's father, where she remained secreted till his fury subsided.

On another occasion, in November 1875, the plaintiff threatened to strike the defendant with a *dao*, and would have carried his threat into execution had she not run away into the room of the wife of Baboo Tarrucknath Ghose. One day in January 1876, while the defendant was engaged in preparing betel, the plaintiff stealthily approached her from behind with a *bati* in his hand, which he raised to strike her with, but her screams brought the plaintiff's father, Lokenath Ghose, into the room, who immediately snatched the *bati* from the plaintiff's hand, and took him away from the room. Lokenath Ghose further advised the defendant to go away to the house of her mother, which she did on the next day, and where she is still residing. Under the circumstances above-mentioned, she submitted that she was perfectly justified in refusing to go and live with the plaintiff, and contended that the plaintiff was not entitled to insist upon her returning to him. For the above reasons she asked that the suit be dismissed against her with costs.

In the cross-suit brought by the wife against her husband for maintenance, she recapitulated all the allegations of cruelty mentioned in her written statement.

At the trial in the Lower Court, the acts of adultery and cruelty on the part of the husband were conclusively proved by the wife, but as it also appeared from the evidence, that, after all the acts of cruelty

complained of had been committed, the wife, while she was living in her mother's house, under the protection of her mother and brother, and acting as a free agent, voluntarily and willingly allowed her husband frequently to resume cohabitation with her—under such circumstances, Mr. Justice Wilson in his judgment stated, "I can come to no other conclusion than that she desired to forgive past offences, and resume her conjugal position and duties. I think, therefore, that everything which took place before cohabitation was resumed, was condoned, and that the wife cannot now bring forward those acts as grounds for separating from her husband. There was one act subsequent to cohabitation—an incident at the mother's house. A quarrel took place, and the husband struck his wife a slap in the face. This was said to have been seen by the brother. Such an act was unmanly, but I don't think that it is such cruelty as to justify the wife in separating herself from her husband. On these grounds, I think, the husband is entitled to judgment. But, having regard to what has occurred, he should be warned that if such acts of violence as those complained of are repeated, not only is the civil law strong enough to give redress to the wife, but he may lay himself open to punishment under the criminal law. There will be a decree for the husband with costs on scale No. 2. The wife's suit will be dismissed with costs on scale No. 2."

From this decision the wife appealed. Mr. Jackson and Mr. Bonnerjee, for the appellants, contended, 1st, that a suit for the restitution of conjugal rights was quite contrary to the principles of Hindu law, and could not, therefore, be maintained, 2nd, that the acts of cruelty complained of, were, as a matter of fact, not condoned by the wife, 3rdly, that the mere fact of subsequent cohabitation between husband and wife, does not in point of law operate as condonation of acts of cruelty; 4thly, that the blow given by the husband on the face of his wife after her alleged condonation, was sufficient to revive the acts of cruelty complained of.

That, under these circumstances, there being ample grounds for apprehending a renewal of his cruel conduct, she was justified in refusing to return to him.

The question of costs was not discussed, as Mr. Bell stated that his client would not press for them against his wife, were the appeal to be decided in his favour.

The arguments of counsel for the appellant being concluded, the Appellate Court, without calling upon the Advocate General and Mr.

Bonnand, who appeared for the respondent, in dismissing the appeal, confirmed in the following Judgment the decision of the Lower Court.

Garth, C. J. (*Pontifex, J.* concurring). We are of opinion that the decree of the Court below should be confirmed.

Speaking only for myself, I confess I think it very probable, that, if we only had to consider the comfort and happiness of the parties concerned, the best way of disposing of the case would be to dismiss both suits.

But the parties have taken their own course; they have insisted upon going to the expense of a trial. The case has been decided by the Court below, and we have only to consider whether that decision is right.

Now, although we entertain no doubt that, as a matter of law, a suit for restitution of conjugal rights may be maintained by a Hindu in this country, we are not at all prepared to say, that the same state of circumstances which would justify such a suit, or which would be an answer to such a suit, in the case of a European, would be equally so in the case of a Hindu.

The habits and customs of the Native community, especially as regards the marriage state, are so different from ours, that we think in such a matter as a suit for the restitution of conjugal rights, the Hindu and the European cannot always be fairly judged by the same rules. We are bound to say, however, that in this particular case, the conduct of the husband was such, both as regards adultery and cruelty, as in our opinion to justify the wife at one time in seeking her mother's protection; and if nothing had afterwrads occurred which amounted to a condonation of the husband's offence, we are not prepared to say that he would have been entitled to sue her for the restitution of his conjugal rights.

He appears to have lived a very profligate life. He was not only in the habit of consorting openly with prostitutes,—but he seems to have insulted his wife by introducing one of them on several occasions into her private apartments. He indulged habitually in wine and spirits, not perhaps to the extent which his wife would lead us to believe, but at any rate so as to be very constantly in a state of intoxication, and when he was in this condition he ill-treated and threatened his wife with knives and other weapons in such a way as to induce very natural apprehensions on her part for her own personal safety.

Under these circumstances she left his house, and went to live with her mother, under the protection of her own family. Here her husband visited her, and through the wise and proper mediation of her own relatives (her mother and brother), a reconciliation, to all appearance, took place.

The husband, on the occasion of these visits, slept and cohabited with his wife in the usual way, and so far as appears, with her full and free consent. On one occasion he stayed with her for several days, and the result of this intercourse was that she became with child.

It appears to us that this conduct of the wife, unexplained, is certainly very cogent evidence that she had condoned his previous conduct. We think that if, in this state of things, he had requested her to return to his house and she had refused to do so, he would have been entitled to bring a suit against her for the restitution of his conjugal rights.

It has been urged upon us strongly on behalf of the wife, that the fact of her thus cohabiting with him at her mother's house must be attributed not to any desire for reconciliation, but rather to a sense of duty and the obligations under which a Hindu wife is placed to submit herself to her husband's wishes and authority, and we have been referred to a class of cases in England, of which D'Aguilar v. D'Aguilar (1 Hogg, p. 745 and 3 Hogg, p. 777) and Curtis v. Curtis (1 Swabey and Tristram, pp. 75 and 192), are types where it is undoubtedly said by high judicial authority that condonation on the part of the wife must in many cases not be presumed from the mere fact of her continuing to cohabit with her husband after infidelity or cruelty on his part, because a virtuous and self-denying woman will often for the sake of her children, or for the peace or reputation of her family, submit to live and even sleep with her husband as a matter of duty, against her own inclinations, and without any intention of condoning his offence.

No doubt there is much force in this argument, and if in this instance we could see that the cohabitation and apparent reconciliation between husband and wife were the result of actual or moral force, or compulsion, we might take a different view of the case.

But here, as it seems to us, the wife was to all intents and purposes a free agent. She was under her mother's roof, and the protection of her mother and brother. There was no reason why, if she had so pleased, her husband might not have been excluded from access to her altogether. There was no difficulty about her child, because she had the child un-

der her own charge; and no threats or intimidation appear to have been used by the husband, either to compel compliance with his wishes, or to take away the child from her, in case she refused to consort with him.

We cannot, therefore, accede to the contention of the Appellant's Counsel, that any force, either actual or moral, was used to coerce her free will, and that being so, we are disposed to put the same construction upon her conduct as we should upon that of a European lady under similar circumstances, and to say that a reconciliation did in fact take place, and that she did so far condone his offence as to restore him to his former conjugal rights and position.

The only remaining question is whether the slap in the face which he afterwards gave her on one occasion was such an act of cruelty and ill-usage as to neutralise the effect of the condonation, and to justify her in treating the reconciliation as if it had never taken place.

Mr. Bonnerjee was no doubt quite right in saying that condonation, however complete it may be in the sense of restoring the husband to his former privileges, is so far conditional (see Durant v. Durant, 1 Hogg, p. 751, and Curtis v. Curtis (Swabey and Tristram), that it depends upon the offence of the husband not being repeated, and in the case of cruelty we quite think that a much smaller measure of offence would be sufficient to neutralize the condonation than would have justified the wife in the first instance in separating herself from her husband.

But then we consider that the act or acts of cruelty must be of such a nature as to give the wife just reason to suppose that the husband is about to renew his former course of conduct, and consequently to entertain well founded apprehensions for her personal safety.

Now, we cannot put so serious a construction upon what occurred in this case. The slap in the face was given with the open hand at a time when the husband was under the influence of drink, and in a moment of irrigation when his wife was worrying him for money, a subject which seems to have been a very frequent cause of discord between them.

The brother certainly says that he heard his sister cry out, and on coming in the room he saw the traces of tears upon her face; but considering the state of temporary excitement under which the husband was labouring, we think it would be taking too serious a view of the circumstances to say that the blow was sufficient to neutralize the effect of the condonation. If the wife had only exercised, as she should have

done, a little good sense and discretion she would have known that it was not a prudent thing to introduce irritating topics at such a time; and it is to be hoped that when she returns to her husband's house, which we think it our duty to require her to do, she may learn so to regulate her own conduct, and to deal patiently and judiciously with her husband's frailties, as to secure her own happiness and comfort.

There seems reason to suppose that she is under some mistake as to the character of the woman who is living in Lokenath's house. From the affidavit which had been read to us, it appears that this woman is an old nurse and dependant of the family, who has lived there for many years. But we think it right, after what has occurred, to secure the defendant a house untainted by the presence of any persons of bad character; and we therefore propose so far to modify the decree of the Lower Court as to make it a condition that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife.

As regards the costs, the Advocate General has very properly offered on behalf of his client to waive his right to them in both Courts; but much as we approve of the spirit in which that offer is made, we think that we ought only to act upon it, conditionally upon the defendant submitting herself to the decree of the Court in all obedience and good faith.

If she does so, she will have to pay no costs. If she does not, she must pay the costs of both Courts on scale No. 2. Either party will be at liberty to apply to the Lower Court in the event of the terms of the decree not being fairly and properly carried out.

Correspondence.

BOND—CONSIDERATION—BURDEN OF PROOF.

To the Editor, "Legal Companion."

SIR,

During the course of my practice in the Subordinate Court of Cocanada, I have found that the Judges that successively presided in that Court held quite opposite opinions, as to the burden of proof in suits for money due on bonds, where defendants admitted execution but pleaded want of consideration. Some held, in the cases alluded to, that plaintiff should prove payment of consideration; while others incisted that defendant should prove want of consideration, perhaps following the decision of the Madras High Court, which seems to have held that in a suit on a bond the *onus* of proving failure of consideration lies on defendant (I. M. H. C. R. 447; II. *Ibid.* 174). I have my reasons for my opinion that in the cases, in question, the plaintiff should at least, adduce some evidence of payment of consideration and then a heavy burden will lie on the defendant to rebut that evidence, and satisfy the Court as to the circumstances under which the bond went into the hands and continued to remain in the possession of the plaintiff. I beg my fellow subscribers to be kind enough to express their opinions on the subject, pointing out any recent decision or other authority that conclusively settles the point in question.

Yours truly,

K. PERRAJU.

Cocanada.

* S. 102, Act I., 1872 has settled the point. Ill. (*b*) of that section is as follows :—"A sues B for money on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed, and the fraud is not proved. Therefore the burden of proof is on B."—ED., *L. C.*

S. 172.

91. Absconding by a person against whom a warrant has been issued must be dealt with in the manner provided by law under the Code of Criminal Procedure, and not under Section 172, Indian Penal Code.—*Queen* v. *Amir Jan*, 7 N. W. P. 302.

92. A warrant addressed to a nazir by a Civil Court for the arrest of a defendant in execution of a decree is not a notice, summons, or order, within the meaning of Section 172 of the Penal Code.—*Queen* v. *Zahar Ali Khan*, 4 N. W. P. 97.

93. A warrant addressed to a police officer to apprehend an officer and to bring him before the Magistrate, is not "a summons, notice, or order" within the meaning of s. 172, Penal Code; and the offence of absconding by an offender against whom a warrant has been so issued, is not punishable under that section.—5 W. R., Cr., 71. See 9 W. R., Cr., 70.

S. 173.

94. Refusing to sign a summons by an accused person does not constitute the offence of intentionally preventing the service of a summons on himself, under sec. 173, Indian Penal Code.—*Reg.* v. *Kalya bin Fakar*, 5 Bom. H. C. R., 34.

S. 174.

95. What is contempt of lawful authority of Public Servant under s. 174, Penal Code.—10 W. R., Cr., 33; 14 W. R., Cr., 20.

96. A conviction under this Section for disobeying a verbal order of a Village Magistrate is good.—7 Mad. H. C. R., 3.

97. A Mahalkari invested with the powers of a second class Subordinate Magistrate cannot issue a summons under sec. 8 of Act XI. of 1843, nor can a person be convicted under s. 174 of the Indian Penal Code for having disobeyed such a summons so issued.—*Reg.* v. *Vynkaji Bhaskar*, 8 Bom. H. C. R., 19.

98. This Section does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of a Civil Court.—*Reg.* v. *Sardar Pathu*, 1 Bom. H. C. R., 38.

99. The Chairman of Municipal Commissioners appointed under Act XXVI. of 1850, although a public servant, is not legally competent as such to issue an order for attendance before him.

Held, accordingly, that disobedience of such an order was not an

offence within this Section.—*Reg.* v. *Purshotam Valji*, 5 Bom. H. C. R., 33.

100. *Held* that a conviction under s. 174 of the Indian Penal Code for "having intentionally omitted to attend the *Mahalkari's Katchery* to give evidence in a revenue case under ss. 26 and 29 of Reg. XVII. of 1827, though the summons issued was duly served upon the accused" was not illegal.—*Reg.* v. *Narainappa Combte*, 5 Bom. H. C. R., 39.

101. There must be evidence of an express order having been given and disobeyed.—6 Mad. H. C. R., 10.

102. To support a conviction under this Section, it is not sufficient to prove the mere service of summons by affixing it to the door of the house but it must be proved that the summons was actually brought to the knowledge of the accused and that he intentionally disobeyed it.—6 Mad. H. C. R., 29.

103. A conviction for disobedience to a summons which does not specify the place at which attendance was required is illegal.—7 Mad. H. C. R., 14.

104. A batta peon entrusted with a warrant of arrest shewed it to the person named therein and bade him follow him. The defendant absconded—*Held*, that he could not be convicted under this Section.—7 Mad. H. C. R., 44.

105. There is nothing to prevent a Magistrate from taking cognizance of a contempt of Court under s. 174, Penal Code committed against his own Court.—8 W. R., Cr., 61 (*over-ruled* by 13 W. R., Cr., 66). See 9 W. R., Cr., 13.

106. The affixing of a proclamation under s. 159 Act VIII. to the *mál* cutcherry of an absconding witness without proof of attempt at personal service of summons under ss. 155 and 156, was held to be no legal service rendering him punishable for contempt under s. 174, Penal Code.—7 W. R., Cr., 58.

107. A Deputy Magistrate not in charge of a division of a District has no jurisdiction to try a case under s. 174, Penal Code, which originated under s. 68, Act XXV. of 1861, and was not referred to him by the Magistrate of the District.—10 W. R., Cr., 4.

108. A Magistrate cannot take cognizance of an offence under s. 174, Penal Code committed against his own Court, but is bound, under s. 171, Act XXV. of 1861, to send the case for trial before another Magistrate.—13 W. R., Cr., 66. See also 15 W. R., Cr., 2, 88.

S. 175.

109. Disobedience of an order to produce evidence under s. 14 of Bombay Act I. of 1865 cl. 1 does not render a person liable to criminal prosecution but simply to an adjudication in his absence.—*Reg.* v. *Manikram Surajram*, 11 Bom. H. C. R., 231.

S. 176.

110. S. 176 Penal Code applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation.—16 W. R., Cr., 35; 18 W. R., Cr., 22.

111. The refusal of a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence or render him liable to punishment, under s. 176, Penal Code, for intentional omission to give information for the purpose of preventing the commission of an offence.—7 W. R., Cr., 29.

S. 177.

112. Yesu gave accused four annas with which to buy a stamp for him (Yesu), and when the stamp vendor asked accused his name, he gave Yesu's instead of his own.

Held that the offence was not cheating by personation under s. 416 but an offence under Sec. 177, Indian Penal Code.—*Reg.* v. *Raghoji bin Kanoji*, 3 Bom. H. C. R., 42.

113. Certain vaccinators were charged with furnishing false returns to their official superior. The Magistrate found as a fact that the returns furnished were false, but acquitted the defendants on the ground that they were not *legally bound* to furnish information within the meaning of Section 177 of the Penal Code—*Held*, that Section 177 embraces every case in which a subordinate may seek to impose false information upon his superior. The defendants in the present case were public servants and part of the duties which they undertook was to make true returns to their official superior. To make false returns was therefore an offence.—6 Mad. H. C. R., 48.

114. S. 177 Penal Code does not apply to the case of any person who is examined by a Police Officer making a false statement, but to cases of certain persons legally bound to give certain information.—12 W. R., Cr., 23.

115. Under Act V. of 1861 a Police Officer is bound to communicate information to his superior officer regarding the commission of a riot and to make an entry thereof in his diary; and the omission to give such information brings him within the purview of s. 177, Penal Code.—21 W. R., Cr, 30.

116. The form of an accusation by a District Superintendent of Police under s. 193 Penal Code does not preclude a Magistrate from framing the charge under s. 177; the sanction of the District Superintendent, required under s. 168 Act XXV. of 1861 to give the Magistrate jurisdiction, need not be express but may be implied.—16 W. R., Cr., 67.

S. 179.

117. The Court before which a contempt of Court under s. 179 Penal Code is committed should not deal with the offence itself but should, under s. 163, Act XXV. of 1861, after recording a statement of the facts constituting the contempt of Court and the statement of the accused person, forward the case to a Magistrate.—11 W. R., Cr., 49.

118. There is nothing in s. 219 Act XXV. of 1861 which prevents an accused person who has forfeited his bail-bond by default of appearance, from being proceeded against under s. 179, Penal Code, notwithstanding that his surety has paid the penalty mentioned in the cognizance.—10 W. R, Cr., 4.

S. 181.

119. Where a false statement is made in a stage of a judicial proceeding before a Magistrate, he ought not to convict under s. 181, Penal Code, but commit to the Sessions under s. 193.—11 W. R., Cr., 24.

S. 182.

120. Distinction between ss. 182 and 211.—8 W. R, Cr, 67; 16 W. R., Cr., 1.

121. A head constable is a public servant within the meaning of s. 182, Penal Code.—11 W. R., Cr., 22; 19 W. R., Cr., 33.

122. Why the law requires the permission of the public servant for bringing a charge of contempt of the lawful authority of public servant under s. 182 or any other section of chapter X. Penal Code.—9 W. R., Cr., 31. See also 11 W. R., Cr., 22, 19 W. R., Cr., 33.

123. No ground for a complaint of giving false information to a public servant under section 182, Indian Penal Code, exists on the part of any one but the public servant against whom the offence was committed.—*Queen* v. *Hari Ram*, 3 N. W. P., 194.

102. A karkun on the establishment of a Civil Court, entrusted with the execution of a warrant, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate, with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused, and ordered the karkun to pay the accused compensation under s. 209, Criminal Procedure Code.

Held that such last-mentioned order was wrong, the karkun not being a complainant within the meaning of s. 209, Code of Criminal Procedure. In such a case as the above the Subordinate Judge should be regarded as the complainant, and he, having acted judicially, was not liable to the penalty provided in s. 209, Criminal Procedure Code.—*In re Keshaw Lakshman,* I. L. R., 1 Bom. 175.

S. 210.

103. Offences punishable under the Penal Code with more than six months' imprisonment are not triable under Ch. XV., Code of Criminal Procedure, and consequently do not fall within the provisions of s. 271 of that Code.—*Anonymous Case,* 4 B. L. R. (F. B.) 41.

S. 211.

104. Where a formal charge has been drawn up, and the accused tried and acquitted, the acquittal should be one under s. 220, Act X., 1872, and not under s. 211, and therefore no amends can be awarded to the accused under s. 209 in such a case.—22 W. R, Cr., 12.

S. 215.

105. In cases triable under the provisions of Chapter XVII. of Act X. of 1872, the Magistrate should not discharge the accused person until after trial, as prescribed in that Chapter. In the matter of *Newar.*—7 N. W. P., 230.

106. A Magistrate is bound, before he discharges an accused person under Section 215 of the Criminal Procedure, to examine all the witnesses, and should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution. —The *Empress* on the Prosecution of *Johardi Sheik* v. *Hemat-ul-la.* —I. L. R., 3 Cal. 389.

107. Where there is no *primâ facie* case against an accused and he has not been put on his defence, nor any charge preferred against him, he should be discharged and not acquitted.—8 W. R., Cr., 45.

108. Under s. 215, Act X. of 1872, an order of discharge cannot be passed unless the evidence of all the witnesses for the prosecution has

been taken; and under s. 220 no acquittal can be recorded unless a charge has been drawn up.—22 W. R., Cr., 25.

109. As to the former.—24 W. R., Cr., 9, 62.

110. It is not incumbent on the Magistrate to examine every person named as a witness by the complainant. S. 215 (Explanation 3) must be read with s. 362 which vests a discretionary power in the Magistrate.—23 W. R., Cr., 9. But see 24 W. R, 62.

111. A warrant case of a nature not compoundable under Section 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

Held that the "dismissal" was equivalent to a discharge under Section 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise, be thought necessary or expedient.—*Reg.* v. *Devama* and *Som Shekhar*, I. L. R., 1 Bom. 147.

112. When an accused person has been discharged by a Subordinate Magistrate under Section 215 of the Code of the Criminal Procedure, and the Magistrate of the District, after calling for the proceedings, considers that the order of discharge was improper, the proper course for the Magistrate of the district to adopt is to refer the proceedings for the orders of the High Court, and not to order a new trial by another Subordinate Magistrate.—*Imperatrix* v. *Gawdapa Bin Venku Gawda*, I. L. R., 2 Bom. 535.

113. It is illegal and ultra vires on the part of a Magistrate to revive before himself, criminal proceedings, against an accused who has already been discharged under Section 215 of the Criminal Procedure Code when no further evidence is procurable than that which was before the Court on the first occasion.

Per Markby, J.—When the discharge has been improper, the only proper course open to a Magistrate is to report the case to the High Court for orders, and that Court, if of opinion that the accused has been improperly discarged, will order a retrial.

Per Curiam.—A Magistrate cannot himself be a witness in a case to which he is the Sole-Judge of law and fact. *Per Markby, J.*—When in such a case he has given his evidence, and convicted the accused, his having so acted makes the conviction bad. *Per Prinsep, J.*—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient if believed to support the conviction.

This being a proceeding under Section 297, of the Criminal Procedure Code, the Court refused to go into the evidence.—*Empress* v. *Donelly*, I. L. R., 2 Cal. 405, 495.

S. 216.

114. The course taken by a Magistrate before preparing a charge under this Section must depend upon the circumstances of each case and the Magistrate should exercise his discretion in the matter.—3 Mad. H. C. Rep. 2.

115. Omission to prepare a charge does not necessarily vitiate the proceedings.—*Reg.* v. *Kabhai Ranabhai et. al.* 5 Bom. H. C. Rep , 40.

S. 218.

116. An accused person has, under Section 218 of Act X. of 1872, the right to recall and cross-examine the witnesses for the prosecution at any time while he is engaged on his defence and before his trial is concluded. He is not precluded from asserting and exercising the right, by reason of his having cross examined them before he was put on his defence, or by reason of his not having, *suo motu* expressed his wish to do so at the time he was called upon to enter on his defence, and when the witnesses were in attendance in the Court and did not require to be re-summoned.—*Queen* v. *Lall Singh*, 6 N. W. P. 270.

117. An accused person is not deprived of the right given him by Section 218, Act X. of 1872, to recall and cross-examine the witnesses for the prosecution after the charge has been drawn up against him, by reason of the witnesses having been cross-examined before the charge was framed.

A Magistrate should not of his own motion discharge the witnesses for the prosecution until the accused person has exercised or waived the right of cross-examination given him by the section. When it becomes necessary to adjourn the hearing, the Magistrate should in all cases inquire of the accused if he desires to exercise his right of re-calling the witnesses for the prosecution, or consents to the discharge of all or any of them. If the accused consents to their discharge, he is not entitled to have them re summoned as a matter of right.

Where it became necessary to adjourn the hearing and the Magistrate did not call upon the accused to exercise his right under the Section, and there was no sufficient proof that the accused person consented to the discharge of the witnesses for the prosecution, it was *held* that the

accused was entitled to have the witnesses, whom he desired to cross-examine at the further hearing, re-summoned.

Quære.—If the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time, whether the Magistrate would thereupon be at liberty to discharge the witnesses.—*Queen* v. *Lall Mahomed*, 6 N. W. P., 284.

S. 219.

118. Where a Magistrate convicted certain persons without allowing them a proper opportunity for the summoning and attendance of witnesses named for the defence, the High Court quashed the conviction and directed the Magistrate to re-hear the case.—5 Mad. H. C. Rep., 27.

S. 220.

119. Where there is no *primâ facie* case against an accused and he has not been put on his defence, nor any charge preferred against him, he should be discharged and not acquitted.— 8 W. R., Cr., 45.

120. Where a formal charge has been drawn up and the accused tried and acquitted, the acquittal should be one under s. 220, Act X. of 1872, and not under s. 211, and therefore no amends can be awarded to the accused under s. 209 in such a case.— 22 W. R., Cr., 12.

121. Section 221 of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial.

Although the explanation to Section 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require, that the conviction or acquittal should be by the Magistrate who drew the charge.—The *Empress* v. *Kudrut-oll-lah*, I. L. R., 3 Cal. 495.

S. 222.

122. In a summary trial under s. 222, Act X. of 1872, it must clearly appear on the face of the conviction that the case was dealt with as one of those which come under the purview of that Section.—24 W. R., Cr., 21, 11. See 23 W. R., 19—20 W. R., Cr., 17; 22 W. R., Cr., 28, 29—23 W. R., Cr., 8.

123. It is not in the power of a Magistrate to reduce an offence so as to make it the subject of a summary trial.—24 W. R., Cr., 48.

10. A sense of the necessity for fixed laws is one of the earliest sentiments of every settled community. It rests on the constraining influence of habit, a centripetal instinct and the perception of utility according to the dominant notions of the general good. The physical circumstances and the prevailing beliefs of a people form an environment or nidus in which the common tendencies of human nature are developed in a tribal or national form which then reacts strongly upon the elements from which it sprung. Thus a people's law composed of a universal and an individual element becomes as characteristic as its language. It presents itself in concrete forms the suitability of which is immediately apprehended by the popular consciousness, or which are rather determined by it in the very process of germination. By time and use what was vague and unorganized becomes in a measure fixed and symmetrical. The yet unrecognized working is felt of the instinct of order and system; a new or unfixed rule of convenience is moulded to a form consistent with the general spirit of the received custom by the influence of association and a sense of congruity; while the lapse of years surrounds with a sacred halo those earlier laws which are linked with the dim and magnified traditions of the past.

11. As a community advances, the extension of its territory, the separation of employments, the multiplied forms of individual development, enfeeble the commom consciousness of legal right which made its earlier law. In the subordinate aggregations which form towns and villages, as in those divisions of the people which compose different classes, a unity of feeling springing from local neighbourhood, similar pursuits or identity of moral tendency still gives birth from a contact with new circumstances to usages whose fitness is recognized, and causes their reception as rules of custom. In the wider sphere of general law the requisite developments have to be effected by scientific evolution from the earlier established principles insensibly modified by the medium in which Courts and jurists work,* or by positive legislation on the part of the sovereign authority. The capacity for a spontaneous development of law in the people wanes as the facts to be regulated grow more complex. A sense of comparative imbecility in the presence of the more definite and palpable embodiment of the public force deprives its law-creative faculty of liveliness and vigour.† The cloudy sugges-

* See Maine's Ancient Law, Ch. II, pp. 31 33 (third edition.)

† The establishment of the British power in India has been followed by a decline of the village-communities as independent centres of political life, which is sometimes regretted but was plainly inevitable. In providing for the growth of society as a whole, and favour-

tions which come from this source encounter as to all the great interests of society the clear-cut provisions of a written law. New ideas grow up, new discoveries are made, giving rise to new institutions, fashions and employments. An individualism and independence of action have meanwhile become possible and prevalent which submit to no control less powerful than that of the whole State. It is then the legislature alone which can pronounce the doom of effete laws and perform a work of reconstruction answering to the spirit and the needs of each successive generation.

12. Now this, which is true of communities in general, is in a peculiar degree true of the great community of British India. The apposition at almost every conceivable point of all that is oldest with all that is newest in civilization has produced groupings of fact and jural necessities with which it was impossible that the indigenous law should be able to cope. The legal consciousness of a people bound in the chains of caste and tradition could not develop itself concurrently with the new physical and moral changes brought in by the masterful foreigner. Those only who were familiar with the actual working of the new order of things, though in a different region, could hope to frame laws appropriate to the new world they were creating.* The introduction of the English law, or of legislation founded on the English law, into British India may be compared with the general adoption in Europe in the Middle Ages, and especially in Germany, of the Roman law, though the rate of change is infinitely faster. In the slowly-won victory of the enlightened classes over the dull persistence of their ignorant countrymen, the diffusion of new ideas and the creation of new wants and new sensibilities produced in the jural sphere a craving for regulations which could not be built up upon the rude framework of Teutonic tradition. The official depositories and mouth-pieces of custom found no formulas quite adapted to the new exigencies, while the Civil law presented in a consistent system plain rules for daily needs, which yet conformed to general principles of the widest application. There was no need to find out through costly failures the way to sound conclusions. The requisite

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ing individual enterprise, the Government had to limit the authority once exercised by the small communities, and once the necessary stay of their corporate existence, but become in the presence of a higher organization a means only of isolation and obstruction. Restricted in its power to enforce rules by the predominating influence of the ubiquitous "sarkar," the village-assembly soon lost the capacity to invent them. It ceased to be an effective organ alike of the public strength and of the public will. This atrophy in its turn necessitated an increased energy on the part of the Government, and centralized legislation took the place of customary law, as it alone could provide for the extended relations springing from a freer and wider-ranging activity.

experiment had been made, and the result so expressed as to produce instant conviction. Thus, the Roman law took its place beside the Customary law, and in the course of generations went far to supersede it. Anomalies in time grew up in this system of double origin. There were inconsistencies of judicial decision and a wilderness of contradictory literature. The Code of Frederick the Great first attempted a thorough-going remedy. The Austrian Code followed; and then the Code Napoleon collecting the opinions of the great legists of France became a model, even in its errors and defects, for half the continent of Europe.

13. We may gather from this retrospect that the influence of English government, of an English mercantile class, of English literature, and acquaintance with English institutions, made the adoption of the English law in its leading principles an inevitable necessity for modern India. The new conditions of social existence raised questions to which the indigenous law gave no answer, or worse than none. Recourse was instinctively had to the law which furnished the requisite solutions, and its decisions once admitted in a few cases exacted conformity throughout a wide area to the principles on which they rested in order to prevent obvious and glaring contradictions. The English race could effectively construct—could even imitate—no civilization but the English; and of this the English law is a vital part. Step by step it made its way by occasional direct legislation, by methods of exposition and by the judgments of the Courts in a fragmentary way into every corner of the country. Mufassal munsifs, speaking no language but their vernacular, were told at last by a Chief Justice through their superiors that they were bound to dispose of the litigation of Marathas according to the principles of English law which the Courts at Westminster would bring to bear on the same cases.* This, which might seem a *reductio ad absurdum* of the assumptions on which the highest Courts of India had for years proceeded, was after all not a mere logical disproof of the premises from which it was inferred. It was but a somewhat premature anticipation of the result to which things were inevitably tending. The earlier and more obvious works of codification—the Criminal Codes and the Code of Civil Procedure—then already been produced; but it was now demonstrated that a more searching and laborious task must be undertaken. In the new difficulties which were daily arising, the Native judges, cut off by an elaborate

* See 2 Bom. H. C. R 35, per Couch, C. J.

education from sympathetic accord with the thought of their own people, ill-read in their own legal literature and thoroughly conscious of the tests by which their abilities would be appraised, would resort for guidance to the English text-books—to them and to judgments of the High Courts steeped thoroughly in English law, as might be expected from judges long familiar with the lore of the reports. By the Appellate judges the decrees of the lower Courts would be approved or condemned, an improved reading of the English law only being substituted for a defective one, and the chain of precedent at every step growing stronger. A system having won acceptance, no individual judge, however enlightened and sensible, could set bounds to its predominance. Even the terms of the English Real Property Law, drawn straight from the feudal system, have become, with all their misleading connotations, a part of the common vocabulary of the Courts.

14. From such an irregular and haphazard mixture of incongruous systems, some kind of order would in time no doubt have been evolved by the Courts. But the time might be a very long one—all the longer on account of the replenishing of the High Courts periodically by barristers sent straight from England, and therefore, however able, strangers necessarily for some time to the special tendencies of thought, and the special ways of confronting facts, proper to the Indian lawyer. Meanwhile, the people would suffer from uncertainty, and the law become a luxury for the rich or a gambling excitement for men on the brink of insolvency. The Legislature was imperatively called on to regulate the new development on a rational appreciation of the principles to be adopted or rejected, of the forms in which they should be grouped and of the proper place of each greater chapter in the general system of law. A Code, in short, had become necessary in order to prevent the endless litigation, the ruinous losses, the manifold embarrassments and the discouragements to traffic and enterprise which would attend the slow formation of a complete body of law by the wasteful process of natural selection. The necessity has not diminished with time. On the contrary, such progress as has been made, as it has rested on an assumption of principles drawn directly or by generalization from the English system, has given to those principles a range of influence,—has so imbedded them in the living body of the Indian law—that all further growth of the jural system must in some way conform to them. The choice is between the halting and contradictory action of the Courts and of chance usages growing up amongst a miscellaneous population and

ACT VII. OF 1880.

THE INDIAN MERCHANT SHIPPING ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the* 11*th March* 1880.]

This Act contains 85 sections, and comes into force on the 1st June, 1880.—ED., *L. C.*

ACT VIII. OF 1880.

INDIAN LIMITATION AMENDMENT ACT.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the* 12*th March* 1880.]

AN ACT TO CORRECT A CLERICAL ERROR IN THE INDIAN LIMITATION ACT, 1877.

IN the second schedule to the Indian Limitation Act, 1877, No. 171A, column three, for the words "The date of the plaintiff's death," the words "The sixtieth day from the date of the plaintiff's death" shall be, and be deemed to have always been, substituted.

Note.

The Code of Civil Procedure, section 366, as amended by Act XII. of 1879, provided that where a sole plaintiff died and his legal representative did not, within the time limited by law, apply to be placed on the record, the Court should, on the application of the defendant, award him certain costs or pass a certain

order. The "time limited by law" for the application by the representative was sixty days from the date of the plaintiff's death, and the intention was that the defendant should have a further period of sixty days in case the representative failed to make his application within due time. Owing, however, to a clerical error, the period prescribed for the defendant's application was also sixty days from the date of the plaintiff's death, and the result was that the right to apply under the Code, s. 366, was barred by limitation as soon as it accrued. The object of the present Act is simply to correct this error by giving the defendant a period of sixty days from the expiration of the period allowed to the representative.—ED., *L. C.*

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63. The seven MENUS, (or *those first created, who are to be followed by seven more*) of whom SWA'YAMBHUVA is the chief, have produced and supported this world of moving and stationary beings, each in his own *antara*, or *the period of his reign.*

64. Eighteen *niméshas*, or *twinklings of an eye*, are one *cásht'há;* thirty *cásht'hás*, one *calá;* thirty *calás*, one *muhúrta* : and just so many *muhúrtas* let mankind consider as the duration of their day and night.

65. The sun causes the distribution of day and night, both divine and human; night being *intended* for the repose of *various* beings, and day for their exertion.

66. A month *of mortals* is a day and a night of the *Pitris* or *patriarchs inhabiting the moon;* and the division *of a month* being into equal halves, the half beginning from the full moon is their day for actions, and that beginning from the new moon is their night for slumber.

67. A year *of mortals* is a day and a night of the Gods, or *regents of the universe seated round the north pole;* and again their division is this, their day is the northern, and their night the southern course of the sun.

68. Learn now the duration of a day and a night of BRAHMA', and of the several ages which shall be mentioned in order succinctly.

69. Sages have given the name of *Crita* to an age containing four thousand years of the Gods; the twilight preceding it consists of as many hundreds, and the twilight following it, of the same number:

70. In the other three *ages*, with their twilights preceding and following, are thousands and hundreds diminished by one.

71. The divine years, in the four *human* ages just enumerated, being added together, their sum, *or* twelve thousand, is called the age of the Gods:

72. And, by reckoning a thousand such divine ages, a day of BRAHMA' may be known: his night also has an equal duration:

73. Those persons best know the divisions of the days and nights, who understand that the day of BRAHMA', which endures to the end of a thousand such ages, gives rise to virtuous exertions; and that his night endures as long as his day.

74. At the close of his night, having long reposed, he awakes, and awaking, exerts intellect, *or reproduces the great principle of animation*, whose property it is to exist unperceived by sense:

75. Intellect, called into action by his will to create worlds, per-

forms *again* the work of creation; and thence *first* emerges the subtil ether, to which philosophers ascribe the quality of conveying sound;

76. From ether; effecting a transmutation in form, springs the pure and potent air, a vehicle of all scents; and air is held endued with the quality of touch:

77. Then from air, operating a change, rises light *or fire*, making objects visible, dispelling gloom, spreading bright rays; and it is declared to have the quality of figure;

78. But from light, a change being effected, comes water with the quality of taste; and from water *is deposited* earth with the quality of smell: such were they created in the beginning.

79. The before-mentioned age of the Gods, or twelve thousand *of their* years, being multiplied by seventy-one, *constitutes what* is here named a *Menwantara or the reign of a* MENU.

80. There are numberless *Menwantaras;* creations also and destructions of worlds, *innumerable:* the Being supremely exalted performs all this, *with as much ease* as if in sport; again and again, *for the sake of conferring happiness.*

81. In the *Crita* age *the Genius of* truth and right, *in the form of a Bull,* stands firm on his four feet; nor does any advantage accrue to men from iniquity;

82. But in the following ages, by reason of unjust gains, he is deprived successively of one foot; and even just emoluments, through the prevalence of theft, falsehood, and fraud, are *gradually* diminished by a fourth part.

83. Men, free from disease, attain all sorts of prosperity, and live four hundred years in the *Crita* age; but, in the *Trétà* and the succeeding ages, their life is lessened gradually by one quarter.

84. The life of mortals, which is mentioned in *Veda,* the rewards of good works, and the powers of embodied spirits, are fruits proportioned among men to the order of the *four* ages.

85. Some duties are performed by *good* men in the *Crita* age; others, in the *Trétà;* some, in the *Dwápara;* others, in the *Cali;* in proportion as those ages decrease in length.

86. In the *Crita* the prevailing virtue is declared to be in devotion; in the *Trétà,* divine knowledge; in the *Dwápara,* holy sages call sacrifice the duty chiefly performed; in the *Cali,* liberality alone.

87. For the sake of preserving this universe, the Being, supremely glorious, allotted separate duties to those who sprang respectively from his mouth, his arm, his thigh, and his foot.

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THE

LEGAL COMPANION.

BARRISTERS AND VAKEELS.

For some time past there has been growing up a fashion of describing as members of the Bar all members of the Legal Profession, or, at any rate, those of it who have any right to address any Court of Law. We often hear of Mofussil Pleaders described collectively as the Mofussil Bar. There is at least one District Court in Bengal where the Pleaders call their own library the Bar Library. Even educated Englishmen have not always been able to keep themselves wholly free from the contagion. So accurate a thinker as Sir Henry Maine commits the mistake when he speaks of the "numbers and influence of the Native Bar" in a Minute recorded on October 1, 1868, and which is published as Appendix I. to his treatise on "Village Communities." But we can excuse such a casual use of the expression "Native Bar" in preference to a circumlocution like "the body of native pleaders" or "the body of native legal practitioners." It is otherwise when a systematic effort is made, by word or by deed, to ignore, and, if possible, to level down, all distinction between members of the English Bar and the members of the so-called Native Bar. Confusion of ideas in this respect is due to a total misapprehension of the origin and history of the English Bar. It is our purpose to give a brief sketch of this history with a view to elucidate the distinction between the status of Barristers and Vakeels. In doing so, we lay claim to no originality, because there exist ample materials for the history, though perhaps inaccessible to the generality of our readers. We are indebted for the sketch to Blackstone's Commentaries, to Professor Amos's book on the English Constitution, to an article in the *Edinburgh Review*, No. 274, and to the article "Barrister" in the new edition of the Encyclopædia Britannica.

Until the reign of Henry III. all the higher judicial offices in England were filled by archbishops and bishops, abbots, priors, and deans. The advocates who practised in the secular as well as in the ecclesiastical courts were exclusively clerical. In 1217 the clergy were

prohibited by canon from acting in the temporal courts. The change proved extremely mischievous to the community; important duties which had previously been performed by men of skill being now committed to practitioners at once ignorant and unscrupulous. In 1290, Edward I., moved by the complaints and remonstrances of his subjects, issued a Commission of Inquiry. The Report to Parliament gave a startling representation of the venality and profligacy which prevailed in the profession generally. In the year 1292 a second commission was issued with the sanction of Parliament. These Commissioners were directed to search throughout the kingdom for respectable and competent attorneys to do the work of the Superior Courts then fixed at Westminster by virtue of the 17th clause of Magna Charta [" Common Pleas shall not follow our Court, but shall be holden in some place certain"], the Commissioners declaring that the individuals to be selected should alone practise before those common-law tribunals. The Commission further directed that students, "apt and eager," should be brought up from the provinces, and placed in proximity to the Courts. These young students, the *apprenticii*, as they were called, were placed in the Inns of Chancery,—public offices which, retaining their ancient designation, are to be regarded as the earliest settled places for students of the law. The design was not merely to raise the intellectual standard of the legal profession, but to open to all classes the principles of the Municipal Code under which they lived, as distinguished from the Civil and the canon jurisprudence then too much affected by the clergy and sought to be established by them. Towards the close of Edward's reign, following out the scheme of the Government, Lord Lincoln, the first of the Commissioners, surrendered his town-mansion in Chancery Lane to a body of legal professors and their pupils. This fraternity have ever since been distinguished as the "Hon'ble Society of Lincoln's Inn." Here the Earl died in 1310, the Society taking its name from his title. The Inner Temple and the Middle Temple did not become legally scholastic till the reign of Edward III. The origin of Gray's Inn is that, about the same period, Lord Gray de Wilton granted to certain legal professors and *apprenticii* a lease of his hostelry in Holborn. All these bodies, the several Inns of Court and of Chancery, proceeded on the principle of a collegiate scheme under the constant superintendence and protection of the Crown. Under the sway of the Plantagenets the Inns of Court and of Chancery had acquired a settled constitution and an academic discipline. All who

looked to the higher departments of the profession, all who intended to work as advocates in Court, must have begun their legal studies in an Inn of Chancery. After going through this novitiate, they moved up to, and were entered of, an Inn of Court. There were three classes of *apprenticii*: (1) the junior *apprenticii*, all of the Inns of Chancery; (2) the senior *apprenticii*, who instructed the juniors; and (3) the *apprenticii ad legem*, who, after a curriculum of eight years, and after repeated examinations, were allowed to practise as advocates in the Courts. Men of mark and distinction were appointed Readers. In the Tudor reigns, the term *apprenticius* disappeared, and that of barrister was substituted. The word barrister was not derived from the bar of a Court of justice, but from the bar at which exercises were performed in the halls of the societies. The mootings (which furnished the exercises) consisted of feigned cases thrown into the form of pleadings which were opened by a student and followed up by an utter barrister. The debate was then taken in hand by the cupboard-men (so named from the cupboard, a sort of rostrum in the middle of the hall), with whom, likewise, the Benchers contested. And, finally, the Chief Reader himself, high over all, closed the discussion by delivering his opinion. In the days of Queen Elizabeth each of the four Inns of Court was governed by the Chief Reader and the Benchers, the other inmates consisting of sub-readers, utter barristers, inner barristers, and students. The young student who had quitted his Inn of Chancery was, after three years' study and discipline, called to the Bar of the Inns of Court. In other words, he became an *Inner* Barrister or Barrister *of the Inn*, a degree which satisfied him if he had no view to practice. If he meant to follow the profession, he was next appointed an Utter or Outer Barrister.

We need not pursue the history further, or enter more largely into details. It is easy to see that the status of a Barrister differs widely from that of a Vakeel. Barristers can only be directly employed by, and receive their instructions from, Attorneys or Solicitors; Vakeels may receive their instructions directly from clients. A Barrister cannot sue for unpaid fees by any legal process; a Vakeel can. No action can be brought against a Barrister for negligence in the management of a case, but an action can be brought against a pleader for such negligence. The Barristers are a highly organized body; the Pleaders have no organization. Men are called to the bar, and are disbarred, by self-elective governing bodies; the Pleaders have no such independence. But these

are small differences. The gulf that separates the Barrister from the Native Pleader is wider and deeper than is generally imagined. The Pleader is inspired by no historic recollections. He cannot look back on a glorious past. Not being a member of any organized body, he is not subject to the checks of professional opinion. There is nothing which he would recognize as a rule or principle of professional etiquette The Barrister, on the other hand, has lived in a freer atmosphere and in the midst of a more cultivated society. He has received a more comprehensive general education, and better instruction in the principles of law. He is subject to the restraints of professional opinion, and has a well-defined body of rules to guide him in his professional conduct. Above all, he has the proud consciousness of being one of a powerful and honorable body of public men which, however much it might be slighted by Civilian Judges in India, is in the last resort the source and fount of all the strength and dignity of which the highest English tribunals can boast. He is, so to speak, the descendant of a long line of illustrious ancestors, and cherishes their memory. So long as these differences exist, it would be absurd and hopeless to assimilate English Barristers to other classes of legal practitioners in this country. The Legal Practitioners Act is designedly so named to bring within its purview Barristers, as well as Vakils, Attorneys, Mukhtars, and Revenue Agents. We are grieved to observe this classification. There was no necessity whatever for the Indian Legislature to meddle with English Barristers. The Bar would be strong enough to punish such of its members as would "give, tender, or consent to the retention" of any gratification for procuring business; and we think the Bar is humiliated rather than helped by the fussy flapping of legislation's oppressively caressing wing. While the Legal Practitioners Act needlessly casts a slur on the character of the English Bar, it inflicts a material injury on the Pleaders of the High Court. It trenches very seriously upon their rights and privileges, when it empowers the High Court to admit a fresh class of legal practitioners called Mukhtars to act on the appellate side of the High Court. If the Mukhtars are recognized as a body of legal practitioners competent to act on the appellate side, the Vakeels and Attorneys will lose a considerable portion of their business. The question arises, Has the Indian Legislature any power to modify or repeal any provision of the Letters Patent for the High Court of Bengal? For, as we shall presently see, the section in the Legal Practitioners

Act which enables the High Court to admit Mukhtars is in distinct contravention of the Letters Patent. The preliminary point, therefore, that has to be decided is this: Are the Letters Patent binding upon the Indian Legislature? Act 24 and 25 Vict., cap. 104, entitled "An Act for establishing High Courts of Judicature in India," was an Act of the Imperial Parliament, and there can be no doubt, therefore, that that Act is binding upon the Indian Legislature. No Act of the Supreme Council in India can override an Act of the Imperial Parliament. Now the 17th section of Act 24 and 25 Vict., cap. 104, said that other or supplemental charters might be granted within three years after the establishment of a Court. Then the Act 28 Vict., cap. 15, was passed for extending the term for granting fresh Letters Patent for the High Courts in India. Then came the Letters Patent of the 28th December, 1865. These Letters Patent, therefore, must be taken as supplemental to the Act establishing the High Courts. Being supplemental to an Act of the Imperial Parliament, they must themselves be recognized as having the force of an Act of the Imperial Parliament. Therefore, we say, the Indian Legislature has no right to repeal or alter the Letters Patent of 1865. The decision of the Privy Council delivered by Lord Selborne in the Cossya Jynthia Hills case leaves no doubt upon the matter: "Now it appears to their Lordships from the express terms of the Act 24 and 25 Vict., cap. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council as to all Courts of Justice whatever." This clearly implies that it was possible for the Letters Patent to deprive the Governor-General in Council of all power over the High Courts, so far as the exercise of jurisdiction was concerned. Lord Selborne goes on to say: "The 9th section of 24 and 25 Vict., cap. 104, expressly says that each of the High Courts shall, within its own Presidency, have such civil, criminal, and other jurisdiction 'as Her Majesty may, by her Letters Patent, grant and direct'; and that 'save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council,' the High Court in each Presidency shall have all the jurisdiction of

the Sudder and Supreme Courts, abolished by section 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's Letters Patent) is hereby distinctly recognized." We for our own part may observe that the above is a clear recognition of the principle that the authority of the Indian Legislature over the jurisdiction of the High Courts must be controlled by such provisions of the Letters Patent as relate to it. After comparing a few more sections Lord Selborne comes to the conclusion: "So far, therefore, from being in contravention of any of the provisions of the Statute 24 and 25 Vict., cap. 104, or of the Letters Patent issued under that Statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council as might remove any place or territory from the jurisdiction of the High Court at Calcutta is expressly contemplated and authorized both by those Statutes and by the Letters Patent themselves." (*The Queen* vs. *Buru Hangseh and Book Singh*, 3 Cal. Law Rep. 197.) If authority were needed, the observations quoted above from Lord Selborne's judgment would furnish abundant authority for the general proposition that the Letters Patent are fully binding upon the Indian Legislature, and that the Governor-General in Council has not the power to repeal or modify any provision contained in the Letters Patent of 1865. Why else should Lord Selborne seek for a justification of an exercise of legislative authority by the Governor-General in Council in the fact that such exercise of authority is contemplated and authorized alike by the English Statutes and the Letters Patent? We have thought fit to make the above extracts only to remove all possible doubt as to the true character of Letters Patent and the force they possess. For it is quite certain that any Acts of the Indian Legislature cannot alter Acts of the Imperial Parliament. By section 22 of the Indian Councils Act (24 and 25 Vict., cap. 67), the power of the Governor-General in Council to make laws and regulations is qualified by certain conditions, one of which is "that the Governor-General shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in any wise affecting Her Majesty's Indian territories or the inhabitants thereof." Act 24 and 25 Vict., cap. 104, was passed in the same session with the Indian Councils Act.

If the above reasoning is correct, the 16th section of the Legal Practitioners Act is *ultra vires* of the Indian Legislature. Section 10 of the Letters Patent of 1865 stated distinctly that "no person whatsoever but such Advocates, Vakeels, and Attorneys [as the High Court might admit] shall be allowed to act or plead for, or on behalf of, any suitors in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.' No such persons as Mukhtars were named, and the only classes of persons who might plead or act in the High Court were specifically enumerated. They were to be either Advocates, Vakeels, or Attorneys. Section 16 of the Legal Practitioners Act says: "Notwithstanding anything contained in any Letters Patent or in the Code of Civil Procedure, section 37, clause (*a*), any High Court established by Royal Charter may, from time to time, make rules consistent with this Act as to the following matters—namely, (*a*) the qualifications and admission of proper persons to be Mukhtars practising on the appellate side of the High Court," and so forth. In the name of Law and of Justice we must protest against this encroachment upon the rights of the Pleaders. When the Pleaders are infinitely better trained in the law than Mukhtars, it is not only unnecesary, but absolutely unwise and impolitic, to pursue the course which the Legislature suggests.

It might be said that when the High Court has power to make rules for the qualification and admission of Vakeels, it has only to call certain Mukhtars by the name of Vakeels, and to give them liberty to practise on the appellate side, and the desired object will be attained independently of the Legal Practitioners Act. The High Court has only to pronounce certain men qualified to be Vakeels, though they are now ordinarily called Mukhtars, and the change of designation is all that is necessary. We can only say that such a procedure would be only a degree less absurd than an attempt to transform Vakeels into Advocates, and by a change of designation to effect a real change of status. The jackdaw in peacock's feathers did not look more ludicrously grotesque than would Mukhtars developed into Vakeels, and Vakeels sublimed into Advocates. We have got enough of anomalous lawyers in this country. The position of the Pleaders is sufficiently anomalous. The Mukhtars are a still more anomalous class. And the most anomalous of all are the Covenanted Civil Servants. There is no use swelling the numbers of these various classes of "questionable shape." Let us

have no semi-Advocates and semi-Vakeels, or quasi-Advocates and quasi-Vakeels. Besides, we are not sure that the High Court would not be legally wrong if it wanted, under section 10 of the Letters Patent, to transform certain Mukhtars into quasi-Vakeels. All that the High Court has power to do is to make rules for the qualification and admission of Advocates, Vakeels, and Attorneys. If certain rules are made for the admission and qualification of Vakeels, they must apply to all Vakeels. There cannot be two sets of Vakeels with two distinct kinds of qualification, any more than there can be two sets of Advocates governed by two different methods of admission. If any class of persons is sought to be invested with the privileges of Pleaders, they must receive the same education and pass the same tests as Pleaders. A different course cannot be adopted without detriment to the public interests. Even where it is known to competent authorities that a Mukhtar is a very able man, and even superior to many Pleaders, it is absolutely necessary, in deference to the forms of law, that the Mukhtar should rise to the status of Pleader by the ordinary method, and not by any special rules created by the High Court. To "make rules" for admission means having a uniform test and procedure for admission, and not admitting at discretion. It is very well known to English Judges that some Attorneys are better educated in law than many Barristers. Nevertheless, it has never been thought right to allow Attorneys the privileges of Barristers unless they had been regularly called to the Bar. Those English reformers who want to amalgamate Barristers and Attorneys into one professional body argue at the same time for the introduction of a joint system of education for both branches of the profession. No legislator would venture to propose that Vakeels might at the discretion of the High Court be made Advocates. The absurdity would be manifest, because it would be impossible to have the same method of admission. The High Court has no power to make some rules for some Advocates, and other rules for other Advocates. Nearly as absurd, and quite as prejudicial to the interests of justice, would it be to take away some of the privileges of the Vakeels, and confer them on Mukhtars. The Advocate and the Vakeel have each a history. The word of command may in a moment give them different designations, but it cannot alter their historical antecedents, their character, or their attainments.

THE INDIAN LAW EXAMINATION MANUAL.

By Fendall Currie, Esq., Barrister-at-law.

Calcutta : Thacker, Spink, & Co.

We acknowledge with thanks the receipt of Mr. Currie's beautiful book. It is in the nature of a catechism designed to impress on the minds of students the leading rules and principles of the different branches of Indian law. The method adopted is not one of systematic exposition, but the more impressive method of question and answer. There are chapters on Hindoo Law, Mahomedan Law, the Penal Code, the Criminal Procedure Code, the Evidence Act, Limitation Act, Succession Act, Contract Act, Registration Act, Stamp Act, and Court Fees and Mortgage. The questions are taken partly from recognized text-books, but mostly from papers set at various examinations. The answers are at once clear, concise, and exhaustive. The work is very well conceived and admirably executed It will be of invaluable service to all students of law, particularly such as are preparing themselves for examinations.

The following will interest our Mysore readers:—

FOREIGN DEPARTMENT.

NOTIFICATION JUDICIAL

Fort William, the 1st March 1880

No. 37 *I.-J.*—The Governor-General in Council is pleased to declare that the following rules relating to the agreements of Legal Practitioners with clients, and imposing a penalty on the receiving or giving of commission, shall come into force in the territories of Mysore on and from the date hereof.—

1. In these rules "Legal Practitioner" means an "Advocate or Pleader enrolled in the Court of the Judicial Commissioner of Mysore or in any Court subordinate thereto."

2. No agreement entered into by any Legal Practitioner with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such Legal Practitioner shall be valid unless it is made in writing signed by such person, and is, within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done.

3. Where a suit is brought to enforce any such agreement, if the agreement is not proved to be fair and reasonable, the Court may reduce the amount payable thereunder or order it to be cancelled, and the

costs, fees, charges and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made.

4. Such an agreement shall exclude any further claim of the Legal Practitioner beyond the terms of the agreement with respect to any services, fees, charges or disbursements in relation to the conduct and completion of the business in respect of which the agreement is made, except such services, fees, charges or disbursements, if any, as are expressly excepted by the agreement.

5. A provision in any such agreement that the Legal Practitioner shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such Legal Practitioner, shall be wholly void.

6. Whoever commits any of the following offences —

(a) solicits or receives from any Legal Practitioner any gratification in consideration of procuring or having procured his employment in any legal business,

(b) retains any gratification out of remuneration paid or delivered or agreed to be paid or delivered to any Legal Practitioner for such employment,

(c) being a Legal Practitioner, tenders, gives or consents to the retention of any gratification for procuring or having procured the employment in any legal business of himself or any other Legal Practitioner,

shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.—*Gazette of India, March 6, 1880.*

THE following will interest our Assam readers :—

LEGISLATIVE DEPARTMENT.

NOTIFICATION

Fort William, the 23rd January 1880.

No. 3.—Whereas by Resolutions passed by the Secretary of State for India in Council on the nineteenth day of September, 1872, and fourth day of June, 1874, respectively, the provisions of the thirty-third of Victoria, chapter three, section one, were declared applicable to the territories now under the administration of the Chief Commissioner of Assam :

And whereas the Chief Commissioner of Assam has proposed to the Governor-General in Council a draft of the following Regulation, together with the reasons for proposing the same :

And whereas the Governor-General in Council has taken such draft and reasons into consideration, and has approved of such draft, and the same has received the Governor-General's assent :

In pursuance of the direction contained in the said section, the said Regulation is now published in the *Gazette of India* :—

REGULATION No. I. of 1880.

A Regulation to repeal parts of Regulations V. of 1873 and I. of 1876.

Preamble.

WHEREAS it is expedient to extend the Elephants Preservation Act, 1879, to certain districts in the territories administered by the Chief Commissioner of Assam in which Regulation No. V. of 1873 *(a Regulation for the peace and government of certain districts on the Eastern Frontier of Bengal)* is in force, and also to the portion of the said territories known as the Gáro Hills District in which Regulation No. I. of 1876 *(a Regulation for the peace and government of the Gáro Hills District)* is in force;

and whereas by sections eight to ten of the former Regulation and sections six to eight of the latter Regulation certain rules are laid down with regard to the killing and capturing of wild elephants;

and whereas it is expedient that, on the extension of the said Elephants Preservation Act, 1879, the said sections of Regulation No. V. of 1873 and Regulation No. I. of 1876, respectively, should be repealed; It is hereby enacted as follows:—

Repeal of sections 8 to 10 of Regulation V. of 1873, and sections 6 to 8 of Regulation I. of 1876.

1. Whenever the said Elephants Preservation Act, 1879, is extended to any portion of the said territories in which the said Regulation No. V. of 1873 or the said Regulation No. I. of 1876 is in force, sections eight to ten (both inclusive) of the said Regulation No. V. of 1873 or sections six to eight (both inclusive) of the said Regulation No. I. of 1876, as the case may be, shall be repealed:

Provided—

Saving of existing licenses to kill or capture.

(a) that every license to kill or capture elephants issued under the said sections and in force in any portion of the said territories at the time when the said Elephants Preservation Act, 1879, is extended to such portion of territory, shall be deemed to have been granted under that Act; and

Saving of things done, &c.

(b) that nothing herein contained shall affect anything done or any offence committed or any fine or penalty incurred or any proceedings commenced before this Regulation comes into force.

No. 4.—Whereas by Resolutions passed by the Secretary of State for India in Council on the 19th day of September, 1872, and 4th day of June, 1874, respectively, the provisions of the thirty-third of Victoria, chapter three, section one, were declared applicable to the territories now under the administration of the Chief Commissioner of Assam:

And whereas the Chief Commissioner of Assam has proposed to the Governor-General in Council a draft of the following Regulation together with the reasons for proposing the same:

And whereas the Governor-General in Council has taken such draft and reasons into consideration, and has approved of such draft, and the same has received the Governor-General's assent:

In pursuance of the direction contained in the said section, the said Regulation is now published in the *Gazette of India*:—

REGULATION No. II. OF 1880.

THE ASSAM FRONTIER TRACTS REGULATION, 1880.

Preamble.

WHEREAS it is expedient to provide for the removal of certain frontier tracts in Assam inhabited or frequented by barbarous or semi-civilized tribes from the operation of enactments in force therein; It is hereby enacted as follows:—

Short title

1. This Regulation may be called "The Assam Frontier Tracts Regulation, 1880":

Local extent

It extends to such frontier-tracts within the territories administered by the Chief Commissioner of Assam as the Governor-General in Council may, by notification in the *Gazette of India*, from time to time direct;

Commencement

and it shall come into force in each of such tracts on such day as the Governor-General in Council in like manner directs in this behalf.

Every notification extending this Regulation to any tract shall specify the boundaries by which such tract is separated from the adjoining territory in British India.

Power to direct that enactment shall cease to be in force.

2. When this Regulation has been extended in manner hereinbefore prescribed to any tract, the Chief Commissioner may, from time to time, with the previous sanction of the Governor-General in Council, by notification in the local Gazette, direct that any enactment in force in such tract shall cease to be in force therein, but not so as to affect the criminal jurisdiction of any Court over European British subjects.

Settlement of question as to boundary.

3. Whenever any question arises as to the line of boundary between any tract to which the provisions of this Regulation have been extended as aforesaid and the adjoining territory in British India, such officer as the Chief Commissioner of Assam from time to time appoints may consider and determine such line of boundary; and the order made thereon by such officer, if confirmed by the said Chief Commissioner, shall be conclusive.

CALCUTTA HIGH COURT.

THE 3RD APRIL 1879.

(Before Mr. Justice Ainslie and Mr. Justice Broughton.)

THE EMPRESS v. IRAD ALLY, Accused.*

Sanction to Prosecution under ss. 182 and 211 of the Penal Code—Power of Deputy Magistrate to question Sanction.

A Deputy Magistrate has no power to question an order made by his superior, sanctioning a prosecution under ss. 182 and 211 of the Penal Code.

Whether such sanction has been rightly or wrongly given, is a question for the accused to raise before a competent Court.

This was a reference under s. 296 of the Criminal Procedure Code.

It appeared that one Irad Ally preferred a charge of theft against one Nasseebunnissa before the police. On an examination into the charge the police reported it to be false. Prior, however, to the delivery of the police-report, Irad Ally repeated the accusation in a complaint before the Magistrate, who, without summoning the accused, made over the matter to the Sub-Deputy Magistrate for report; that officer was of opinion that the charge was false, and directed the police to enter it as such, but it appeared that he did not formally dismiss the case.

Nasseebunnissa then applied to the Magistrate for leave to prosecute Irad Ally under ss. 182 and 211 of the Penal Code for bringing a false charge; leave was granted by the Magistrate, who, after directing a summons to issue against the accused, sent the case to a Deputy Magistrate for trial.

The Deputy Magistrate discharged the accused on the following grounds, viz.:—

(1) That the sanction to the prosecution under ss. 182 and 211 was illegal, as there was no judicial investigation into the charge of theft originally made by the accused.

(2) That the Magistrate did not pass a formal order of dismissal on the petition of Irad Ally.

(3) That the Sub-Deputy Magistrate did not hear all the witnesses produced by Irad Ally, as he should have done before pronouncing his complaint to be a false one.

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* *Vide* I. L. R., 4 Calc 869.

The Magistrate, objecting to the proceeding of the Deputy Magistrate, referred the case to the High Court.

No one appeared to argue the points.

The opinion of the High Court was delivered by—

Ainslie, J. (Broughton, J., concurring).—We think the Deputy Magistrate was wrong to question the sanction given by the Magistrate. It was an order made by a superior Court, purporting to be made under a particular provision of law. Whether it was rightly or wrongly made was not for the subordinate Court to enquire into. The Deputy Magistrate was not sitting as a Court of appeal or revision to examine the mode in which the Magistrate of the district had dealt with the case in which he had sanctioned a prosecution under s. 211 of the Penal Code. He was bound to accept the sanction as valid, and leave the accused to question it before a competent Court, if so advised.

We cancel the order of the Deputy Magistrate, and direct him to try the accused on the charges before him.

Order cancelled.

CALCUTTA HIGH COURT.

THE 2ND DECEMBER 1879.

(Before Mr. Justice Jackson, C.I.E., and Mr. Justice Tottenham.)

KALLY COOMAR CHATTERJEA and another

(1st Opposite Party), *Appellants,*

vs

TARA PROSUNNO MOOKERJEE (Petitioner), *Respondent.*

Act XXVII. of 1860—Certificate to minor's next friend—Security.

There is no reason why a minor should not, by his next friend, obtain a certificate under Act XXVII. of 1860. Where the fact of the adoption of a son was disputed, the Judge was held to have been right in refusing to enter into that investigation and in granting a certificate to the natural heir. In such cases, security should be taken from the party to whom certificate is granted.

We think the Judge was right in declining to enter into evidence as to the fact of the adoption of the alleged son, not, however, on the ground that a minor cannot be granted a certificate under Act XXVII. of 1860. On the contrary, we see no reason why a minor should not, by his next friend, obtain a certificate under that Act. But an adopted son not being, so to say, a natural heir, and the fact being disputed, we

think the Judge was warranted in refusing to enter into that investigation, and that the certificate was properly given to the nephew of the deceased, who was the next heir according to the Hindu law in the absence of any nearer kinsmen and heirs. Regard, however, being had to the fact that an adopted son has been set up, and that proceedings have been, or probably will be, taken to establish his rights, the proper course, we think, would be to take security from the person to whom the certificate has been given.

The appeal is dismissed with costs.

MYSORE JUDICIAL COMMISSIONER'S COURT.

BANGALORE, 20TH JANUARY, 1880.

(Before J. D. Sandford, Esq., M.A., Barrister-at-Law, Judicial Commissioner.)

LINGEE and LINGEE* (Defendants), *Appellants*,

vs.

GUJJAIYA (Plaintiff), *Respondent*;

And

GUJJAIYA* (Plaintiff), *Appellant*,

vs.

LINGEE and LINGEE (Defendants), *Respondents*.

Damages for adultery with the wife of a Hindu.

A Hindu husband can recover exemplary damages from a person who has committed adultery with his wife.

In this case, as to the matter of fact, I accept the decision of the lower Appellate Court that adultery must be taken as proved. The plaintiff's wife left her father's house, where she was living with her husband some six months ago, and has taken up her abode in the defendant's house. Her father swears that she is living in adultery with the second defendant, and so does the second witness, who adds that

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* Cross Second Appeals, Nos. 81 and 104 of 1879, against the decision of the District Judge of the Ashtagram Division in Appeal Suit No. 35 of 1879.

the woman said that Lingee, the second defendant, 'was her husband. Although it would have been more satisfactory had the father been questioned as to the grounds of his assertion, yet there is no evidence on the other side, except that of the first defendant, the father of the alleged paramour; and it would not have been difficult for him to bring evidence of the woman's innocence, if she were innocent.

The lower Appellate Court has, however, thrown out the plaintiff's claim for damages on the ground that the Hindu Law does not recognize such a claim. I think that very strong authority should be adduced for such a position, seeing that ordinarily the law will give a remedy wherever a right has been invaded, and no greater injury can well be inflicted on a man than the corruption of his wife. The gist of an action for damages on account of such injury is the loss of the wife's society, the destruction of the plaintiff's domestic happiness, and the injury to his feelings and honour; and I can conceive no reason why Hindus should not be affected by such considerations, or why damages, and exemplary damages, should not be awarded for such a wrong.

The authorities brought forward in support of the doctrine that Hindu Law does not recognize a claim for damages on account of adultery are to be found at pages 40 to 44 of Sir T. Strange's Hindu Law, second volume, and, no doubt, there will be found there the opinions of Pandits given apparently in two cases tried in the Zilla Courts that damages were not recoverable in such an action, and these opinions are approved by Messrs. Colebrooke and Ellis. But the grounds for the opinion are mainly that the act is one which the Hindu Law regards as a criminal offence, and punishes accordingly. This is, however, no ground whatever for taking away the civil remedy.

On the other hand, there are two cases reported in Morley's Digest, pages 115 and 288 of the first volume. In the first of these an action for criminal conversation between Hindus was allowed in the Supreme Court, and in the second the Sudder Court of Bombay allowed damages for the loss of the plaintiff's wife enticed away by the defendants. And a recent case has been cited by Mr. Minakshaier from the Bombay Reports, I. L. R., Vol. I., Bombay, 164, in which, in a suit between Hindus for restitution of conjugal rights, the broad doctrine was laid down that every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the

husband has, by his cruelty or misconduct, forfeited his marital rights, or has, by some insult or ill-treatment, compelled her to leave him. *A fortiori* is the man who not only receives a married woman into his house, but enters into a criminal connection with her, liable to such an action.

I therefore see no reason why, in such a case, the ordinary law, which allows damages for every injury, should not be followed, and I shall direct a decree for the plaintiff to the amount of damages sued for, namely, Rs. 200, and costs on that amount throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

THE 11TH OCTOBER 1879.

Present:

The Hon'ble Sir R. Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

ON A REFERENCE FROM THE CALCUTTA SMALL CAUSE COURT.

(Before R. S. T. MacEwen Esq.)

THOMAS BROWN AND CO.

vs.

F. W. LAKIN.

Cause of Action—Promissory Notes.

Each promissory note is a separate cause of suit. The including two promissory notes in the same account, or asking for their aggregate amount in the same letter, does not make the two notes one cause of action.

The following judgment of the High Court upon a reference made by Mr. Millett in the above case was read this day by His Honor.

Case stated for the opinion of the High Court under section 55 of Act IX. of 1850 by H. Millett, Esq., First Judge, Calcutta Court of Small Causes.

This is a suit brought to recover Rs. 420, being principal and interest due on a promissory note, dated the 15th of February 1879, signed by defendant.

The suit has been heard with five other suits, but as it involved a question of law only, no difficulty arises in severing it from the others.

The note and the amount are practically admitted, there being no real dispute with regard to such matters; so that, if the High Court is against me on the point referred, judgment may be entered for plaintiff.

The defence raised is that there has been a splitting of the plaintiff's cause of action within the meaning of section 34 of Act IX. of 1850, and the defendant relies on the following letters written by the plaintiffs. The first of these letters is dated the 19th of March 1879, and runs thus:—"As you are aware, your old account remains up to this undetermined, and your new, consisting of three promissory notes, dated the 1st and 15th February and 1st March 1879 respectively, and aggregating Rs. 1,431, exclusive of interest, are still in our hands. We must beg of you to retire two of the promissory notes, and do something more towards the settlement of your old account before we can allow further delivery."

The second is dated the 20th of March 1879, and is —"We do ourselves the pleasure of waiting on you for a reply to ours of yester date. The bearer takes with him your three promissory notes alluded to in our last, and we trust you will do us the favour of retiring those of the 1st of February and the 15th February." And the third of the same date says:—"We beg to wait on you with your promissory notes for Rs. 525 and Rs 400, dated respectively the 1st and 15th February 1879, and on which there is now due us Rs. 952-1-9 only, and shall be obliged if you send us that amount per bearer. We regret our inability to allow these to remain outstanding, and unless you retire them during the day, no alternative will be left us but that of having recourse to legal proceedings." The plaintiff sued separately on the promissory note of the 1st of February 1879, and obtained a judgment thereon on the 5th of April last. I have no doubt that, *primâ facie*, each promissory note is a separate cause of action, and that, by the letter of the 10th of March

last, the plaintiff made one demand on both promissory notes of the 1st and 15th February. The question raised by their having now brought a suit on the latter note when they had already obtained a judgment on the former one is one of some importance, and, as far as I am aware, is one which, though frequently mooted, has never been finally decided, the amount originally demanded having been within the jurisdiction of the Court. Had that amount been beyond the jurisdiction of the Court, there would have been no difficulty, for that question has already been decided in many cases. On reference to the section no particular distinction is drawn between suits within the jurisdiction and suits beyond the jurisdiction, except that, if a suit happens to be beyond the jurisdition, the plaintiff may abandon the excess; the former part of the section would therefore apply to all suits, whether beyond the jurisdiction or not. It cannot be denied that a tradesman's bill from beginning to end forms one cause of action, though each delivery is apparently in the first instance a separate contract. If, therefore, the former part of the section did not refer to splitting of causes of action within the jurisdiction, a tradesman would be at liberty to bring a separate suit on each delivery. No law can ever be presumed to countenance such a proceeding. Have the plaintiffs, then, by making these two promissory notes the subject of one demand, and obtaining a judgment on one, so split their cause of action that they cannot again sue? I think they have. The test in such cases is laid down in *Kempton vs. Willey*, 1 Cox. Mac. and Hert., 350, by Wilde, C.J.: "Has any account been delivered in which the plaintiff put together the two demands in the former one? Have the parties ever treated them as one demand?"

Undoubtedly the plaintiffs have done so here, and, having so done, have split their cause of action with a view to bring two suits in this Court. At the time judgment was delivered, the pleader of the plaintiffs stated that, if I would refer the case to the High Court, they would deposit security for costs. Being of opinion that the question is of some importance to suitors generally, I think it advisable that it should be decided by a higher tribunal. Accordingly I refer the following question:—

Whether, having reference to the letters set out, the plaintiffs have split their cause of action within the meaning of section 34 of Act IX. of 1850, and so precluded themselves from bringing this suit?

Contingent on the opinion of the High Court, my judgment will be for the defendant.

Judgment of the High Court.

We think it quite clear that each promissory note is a separate cause of action within the meaning of section 34, Act IX. of 1850.

It is not because the plaintiff has included the two notes in the same account, or has asked for their aggregate amount in the same letter, that the two notes must be considered as one cause of action.

The rule which has been applied in England under section 63 of the County Court Act 9 and 10 Vict, c 95, to a tradesman's bill for goods supplied to a customer from day to day, stands upon an entirely different footing There is no doubt each supply of goods constitutes a separate contract, but if the tradesman chooses to allow the sums to accumulate, and then sends in a bill for the whole sum due which may be included in one count in the declaration, the entire bill has been held to be one cause of action, which the tradesman is not at liberty to split. (See *Neale* vs *Ellis*, 1 D and Lowndes 163)

But that rule does not apply to cases where the items contained in one account are divers in their nature,— as for instance one claim for a horse, and another for rent, and another for goods sold. (See *Grimley* vs. *Akroy*, 1 Exch. 479, and *Neckham* vs. *Lee*, 12 Q. B. 521.)

It is quite clear that each promissory note is a separate cause of suit, and it has been recognized as such by the legislature of this country in a way which not unfrequently presses very hardly upon suitors in the mofussil. If the holder of several bills of exchange brings one suit there to recover the aggregate amount of them, the stamp-fee which he has to pay under the provisions of the Stamp Act is not measured by the aggregate amount of the bills upon which he sues, but by the amount of the stamp-fees which he would have had to pay if he had brought several suits upon each bill separately.

We think, therefore, that the judgment in this suit ought to be entered for the plaintiffs. We make no order as to the costs of this reference.—RICHARD GARTH: CHARLES PONTIFEX.

HIGH COURT, N. W. P.

THE 9TH FEBRUARY 1880.

(Before the Hon'ble Sir Robert Stuart, Kt., Chief Justice, and the Hon'ble Mr. Justice Pearson.)

GIRDHARI DAS BIRHAMCHARI JI (Defendant), *Appellant,*

vs.

MAJOR P. W. POWLETT, Political Agent and Superintendent of Kotah Estate, on the part of the Government of India (Plaintiff), *Respondent.*

Mr. J. E. Howard and Mr. K. M. Chatterjea, *Counsel,* and Munsukh Ram, *Pleader,* for *Appellant.*

Mr. W. M. Colvin, *Barrister-at-Law,* and the Junior Government *Pleader* for the *Respondent.*

Parties to suit—Principal and Agent—Political Agent incompetent to sue in his own name.

Where the Government took up the administration and management of an estate on the application of the owner, but the right to the estate remained in the owner, no suit for any part of it can be brought except in the name of the owner

Major Powlett, Political Agent and Superintendent of the Kotah Estate, filed a suit, in which he designated himself as the plaintiff, claiming possession of certain buildings and lands in the town of Bindrabun, Zillah Muthra, which had been dedicated to a Hindoo diety by the Rajah of Kotah in connection with a temple placed under the charge of one Girdhari Das Birhamchari Ji, who was named defendant in the suit. The plaint stated that the suit was "*based on the proprietary right of the Rajah;* and the relief sought was valued at Rs. 12,000.

The suit was filed in the Court of the Subordinate Judge of Agra, Moulvie Muhammad Qayum, and the said officer decided adversely to the defendant's plea that the Political Agent had no authority to sue as plaintiff from the Rajah of Kotah, and, further, that the working arrangement made between the Government of India and the Kotah Estate, whereby Major Powlett was authorized to administer the affairs of the estate as a temporary arrangement, did not confer any status upon the Political Agent to sue for recovery of property which was still vested in

his principal the Rajah. The Political Agent relied upon certain correspondence addressed by the Agent of the Governor-General in Rajputana to the Maharao of Kotah, intimating to the Rajah that, owing to the disorganized condition into which the affairs of the State had fallen, the Viceroy had been pleased, at the solicitation of the Rajah, to appoint Nawab Faiz Ali Khan, C.S.I., as Minister for the Kotah State; and upon a letter from the Government of India appointing Major Powlett as substitute for the Nawab in the year 1876.

The Subordinate Judge rejected the plea of the defendant on the above point in the following terms "The papers relating to the appointment of the said officer show that the arrangement regarding the management of Kotah Estate was made in a special manner with the sanction of His Excellency the Viceroy and Governor-General of India in Council, that a sum of money has been fixed for the personal expenses of the Rajah and that he has nothing to do with the administration of the estate which is in every respect governed by the Agent and Superintendent subject to the supervision of the Government of India. There is no law or ruling which would lead me to hold the suit to have been illegally brought in the name of the Agent and Superintendent, nor is there any ground for making such a presumption; inasmuch as it would be clearly improper to judge of the Rajah, who is an intelligent person, and has attained the age of majority according to those ordinary persons to whom the law is applicable. Even in the cases of the minor chiefs whose estates are managed by Agents under the supervision of the Government of India suits are not prohibited to be brought in the names of those Agents. Moreover, the powers vested in the present Agent of Kotah must be considered to be far superior to those vested in the other Agents. Consequently, as he can discharge all the important and intricate business of the estate under the powers vested in him, and is in every respect responsible for it, there is no reason why he should not institute this suit in his own name."

The above finding of the Sub-Judge was impugned in appeal to the High Court by the defendant amongst other grounds taken on the merits. The learned Judges of the High Court had the point under discussion by Counsel for the respondent during more than three hours. It was strenuously maintained by Counsel for the Political Agent that the arrangement under which the Political Agent sued in his own name was in the nature of an *act of State* which took the case in question

out of the ordinary law regulating the status of Principal and Agent. The High Court found for the defendant in the following concurring judgments:—

Sir Robert Stuart, Kt., Chief Justice.—This appeal must be allowed. Indeed, no serious attempt was made at the hearing before us by the Counsel for the respondent to support the judgment, and I must express my surprise and disappointment that so experienced an officer as the then Subordinate Judge of Agra should have been content to have given such reasons as he assigns in his judgment for holding that the instance in this suit had been properly laid. It is not pretended that the Rajah is a disqualified proprietor under the Court of Wards, or that he has been in any respect divested of his rights of property over this estate; and as for the suggestion the position assumed by the Government of India and its Political Agent in this suit could be justified as an act of State: such a contention cannot for one moment be admitted. The claim for interference on the part of the Government of India, whether in its own name or in that of its Political Agent, is one based entirely on a correspondence shewing the necessity of the management and administration of the estate being for a time taken out of the hands of the Rajah; and he himself no doubt acted wisely in applying to the Government for assistance in his troubles. But it is a very different thing to say that such management and administration gave the Government not only the power to administer the estate for the benefit of the Rajah, but to deprive him of his right and title in it and his dominion over it to such effect that the Government could by itself, or by any of its officers, deal with it, and with parties indebted to it, as if it was the Government's own independent property.

For, however large the power of the Government might be in the way of administration and management, the right of the estate itself, and every part of it, the title to the estate, and all that constitutes a *jus in re* in regard to it, remained in, and was inherent in, the Rajah himself, and such a suit as the present could only be brought in his own name, by which means, and by which means alone, could his consent, as the true plaintiff, be made to appear on the face of the record.

In such a case the Government of India neither have themselves, nor can they delegate to others, any larger powers than those that could be given to any other administrator or manager; and the principle on

which his view of the cause rests is, that no man who is *sui juris* can be deprived of his property for a single moment, or for any purpose whatever, excepting by his own deliberate consent and act, such an act on his part as would in law have the effect of at once divesting himself of, and investing his transferee with, his estate.

No doubt, the services agreed to be given to the Rajah on his own application were most important and likely to be very beneficial to himself and his property, but the estate has still remained his, and is his, and his alone, and his name alone can be used in all judicial proceedings connected with its administration. As for Major Powlett, he, as Political Agent and Superintendent of the Estate, under the orders of the Government of India, has simply no *locus standi* whatever, nor could he be allowed to represent the Government of India in such a suit, even if the Government had itself a better title than it has.

The appeal is allowed, and the suit is dismissed with costs in both Courts

Mr. Justice Pearson.—The property in suit is claimed as belonging to the Kotah Estate, and the claim is based on the proprietary right of the Rajah of Kotah. If he be the proprietor of the property, the subject of the claim, he should have been the plaintiff in the suit.

On the other hand, if his right and interest therein has passed to the Government of India, the Government of India should be the plaintiff. The Political Agent and Superintendent of the Kotah Raj does not profess to have any such proprietary right and interest in the property as to entitle him to sue as plaintiff for its recovery. The suit as brought must be dismissed, and the appeal decreed with costs.

DIGEST OF CIVIL RULINGS.

IN determining the amount payable to the holder of a decree for mesne profits, a Court is bound to consider, not what has been, or what with good management might have been, realized by the party in wrongful possession, but what the decree-holder would have realized, if he had not been wrongfully dispossessed. Under a decree for mesne profits, the decree-holder is entitled to interest on such profits from the time at which they would have come to him if he had not been dispossessed.—*Luckhy Narain vs. Kally Puddo Banerjee*, I.L.R., 4 Calc. 882.

A DIVISION Bench of the Calcutta High Court has held that "a firm of capitalists taking a lease of lands from a zemindar, and transmitting their rights to the changing members of the firm, cannot, by any length of occupation, acquire occupancy rights under s. 6 of Act X. of 1859 or Beng. Act VIII. of 1869."—*Rai Komul Dossee* vs. *J. W. Laidley and others*, I. L. R., 4 Calc. 957.

IN an agreement entered into by the Collector of Allahabad with the firm of Nilcomul Mitter and Son, for the monopoly, by them, of the manufacture and sale of rum and native or country spirits for the city and cantonments of Allahabad, there was the following stipulation :—

"In the event of any breach on the part of the said Nilcomul Mitter and Son in the observation or performance of any of the conditions hereof, the aforesaid Nilcomul Mitter and Son hereby bind themselves to pay to the said Collector of Allahabad a penalty of Rs. 5,000."

The Board of Revenue made a reference to the High Court, N. W. P., as to whether this provision of the agreement constituted of itself such an obligation as made it liable to stamp-duty as a "bond." The question for determination was whether the instrument was to be regarded as a mere agreement requiring the stamp-duty of only eight annas or as a bond requiring the stamp-duty of Rs. 25. Oldfield, Pearson, Spankie, and Straight, J.J., were of opinion (dated the 10th and 12th January 1880) that the above stipulation in the instrument met the requirements of the definition of a bond in Act I. of 1879, and accordingly was liable to duty under the provisions of s. 7 of the Act. From this opinion Stuart, C.J., dissented, observing :—

"A very careful examination of the Stamp Act (I. of 1879) has satisfied me that there is nothing in its provisions or its schedules that applies to the penalty of Rs. 5,000 agreed to be paid in the event or events therein expressed, and the legal character of that penalty must be determined solely on legal principle.

"I agree with the Board that the document is not a lease, as defined by the Stamp Act, but a mere a agreement, or memorandum of an agreement, the proper stamp-duty on which is eight annas, and the several clauses and articles which constitute this agreement constitute the primary obligation undertaken by the parties, the Rs. 5,000 being a

mere penalty contingent on the non-performance of the agreement or any portion of it, but which non-performance cannot be anticipated or presumed. On the contrary, the presumption, according to all recognized legal principle, is that the contract or agreement will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise. ' That, I say, is the legal presumption applicable to this part of the case, the right to recover the penalty being a mere contingency which may or may not happen, and which we are not to assume will happen. That being so, this penalty of Rs. 5,000 does not come into consideration at present as matter for stamp-duty. Should the contingency provided against by this penalty occur, it will then be in the power of the Collector to recover it in a proper suit and under an appropriate court-fee. But at present we have, in my opinion, nothing to do with this penalty; what we have to do with, is the true character of the instrument with which, in the manner and to the effect I have pointed out, it is incorporated

* * * * *

"For these reasons it appears to me impossible to regard this penalty as a bond within the meaning of that term as defined by the Stamp Act (I. of 1879), but that it ought to be looked at simply as one of several clauses of the entire agreement, and which, should it ever come to be enforced on the equitable principle I have explained, would involve the levying of a court-fee according to the amount claimed in a suit to be brought for that purpose."

IT has been decided by a Division Bench of the Calcutta High Court (11th December 1878) that a *hatchitta* which has two sides of it, the one headed 'amount advanced,' and the other headed 'amount received,' does not require a stamp.—*Brojender Coomar* vs. *Bromomoye Chowdhrani*, I. L. R., 4 Calc. 885.

WHERE land held by tenants with rights of occupancy was completely submerged for a number of years, and during the period of such submersion, no rent was paid by the tenants, it was held by the Calcutta High Court that the tenants had, by non-payment of rent during the period of submersion, forfeited their rights of occupancy.—*Hem Nath Dutt* vs. *Ashgur Sindar*, I. L. R., 4 Calc. 894.

DIGEST OF CRIMINAL RULINGS.

It was ruled by a Full Bench of the Calcutta High Court on the 26th March 1879 that "a Magistrate is not justified in forfeiting a recognizance under s. 502 of Act X. of 1872, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses, upon whose evidence the rule to show cause why the recognizance should not be forfeited has been issued."—*Empress* vs. *Nobin Chunder Dutt*, I. L. R, 4 Calc. 865. For understanding the above ruling it is necessary to state that a Deputy Magistrate, in trying some persons on a charge of assault, decided on evidence that a person (the above-named Nobin Chunder Dutt) bound to keep the peace (although not a party to the case) had, by the agency of accused persons, caused the breach of the peace to be committed, and called upon him to show cause why his recognizance should not be forfeited, and, without any further evidence, declared the recognizance forfeited.

PRINCIPLES OF THE PENAL CODE.

[*As laid down by the original framers before the Governor-General of India in Council in the year 1837.*]

NOTE M.

On Offences against the Body.

(*Continued from p. 23.*)

The next point to which we wish to call the attention of his Lordship in Council is the unqualified use of the words "to cause death" in the definition of voluntary culpable homicide.

We long considered whether it would be advisable to except from this definition any description of acts or illegal omissions, on the ground that such acts or illegal omissions do not ordinarily cause death, or that they cause death very remotely. We have determined, however, to leave the clause in its present simple and comprehensive form.

There is undoubtedly a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating

the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death. But if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide.

Mr. Livingston, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed, there are few parts of his Code which appear to us to have been less happily executed than this. His words are these: "The destruction must be by the act of another. Therefore self-destruction is excluded from the definition. It must be operated by some act. Therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. A blind man or a stranger in the dark directed by words only to a precipice where he falls and is killed, a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule."

This appears to us altogether incoherent. A verbally directs Z to swallow a poisonous drug. Z swallows it and dies. And this, says Mr. Livingston, is homicide in A It certainly ought to be so considered. But how, on Mr. Livingston's principles, it can be so considered we do not understand. "Homicide," he says, "must be operated by an act." Where, then, is the act in this case? Is it the speaking of A? Clearly not, for Mr. Livingston lays down the doctrine that speaking is not an act. Is it the swallowing by Z? Clearly not, for the destruction of life, according to Mr. Livingston, is not homicide unless it be by the act of another, and this swallowing is an act performed by Z himself.

The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z's death, whether his words operated circuitously by inducing Z to swallow poison or directly by throwing Z into convulsions.

There will, indeed, be few homicides of this latter sort. It appears to us that a conviction, or even a trial, in such a case, would be an event of extremely rare occurrence. There would probably not be one such trial in a century. It would be most difficult to prove to the conviction of any Court that death had really been the effect of excitement produced by words. It would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, and on very peculiar constitutions, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a Criminal Court that Z, the deceased, was in a very critical state of health, that A, the heir to Z's property, had been informed by Z's physicians that Z's recovery absolutely depended on his being kept quiet in mind, and that the smallest mental excitement would endanger his life, that A immediately broke into Z's sick room, and told him a dreadful piece of intelligence which was a pure invention, that Z went into fits, and died on the spot, that A had afterwards boasted of having cleared the way for himself to a good property by this artifice. These things being fully proved, no judge could doubt that A had voluntarily caused the death of Z; nor do we perceive any reason for not punishing A in the same manner in which he would have been punished if he had mixed arsenic in Z's medicine.

Again, Mr. Livingston excepts from the definition of homicide the case of a person who dies of a slight wound which, from neglect, or from the application of improper remedies, has proved mortal. We see no reason for excepting such cases from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch, than by a stab which has reached the heart; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death, than that a stab was intended to cause death. Yet both these points might be fully established. Suppose such a case as the following. It is proved that A inflicted a slight wound on Z, a child who stood between him and a large property. It is proved that the ignorant and superstitious servants about Z applied

the most absurd remedies to the wound. It is proved that under their treatment the wound mortified, and the child died. Letters from A to a confident are produced. In those letters, A congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. It appears to us that if such evidence were produced, A ought to be punished as a murderer.

Again, suppose that A makes a deliberate attempt to commit assassination. In the presence of numbers he aims a knife at the heart of Z But the knife glances aside, and inflicts only a slight wound. This happened in the case of Jean Chatel, of Damien, of Guiscard, and of many other assassins of the most desperate character In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that, in consequence, he is attacked with tetanus, and dies Here again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A as a murderer.

We will only add that this provision of the Code of Louisiana appears to us peculiarly ill suited to a country in which, we have reason to fear, neglect and bad treatment are far more common than good medical treatment.

The general rule, therefore, which we propose is, that the question, whether a person has by an act or illegal omission voluntarily caused death shall be left a question of evidence to be decided by the Courts according to the circumstances of every case.

S. 121.

67. In enacting s. 121, Penal Code, no limitation has been prescribed as to the period within which a prosecution for an offence against that enactment may be commenced.—15 W. R., Cr., 25.

68. In the case of an offence under s. 121, Penal Code, the *Calcutta Gazette* and the *Gazette of India* were held admissible in evidence under s. 8, Act II., 1855, and a printed official letter from the Secretary to the Government of the Punjab under s. 6 of the same Act.—15 W. R., Cr., 25.

S. 141.

69. No charge of being members of an unlawful assembly under s. 141, Penal Code, can be sustained when the intention of the parties was, not to enforce a right or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised.—23 W. R., Cr., 25.

70. Where a landholder attempts to distrain his tenant's property, and the tenants resist the distraint on the ground that no arrears of rent are due, the tenants, if acting *bonâ fide*, cannot be convicted of rioting.—8 Mad. H. C. R. 11.

71. Where the defendants, ryots of a portion of a zemindary sold in execution of a decree of the Civil Court, reaped and carried away their crops despite the purchaser's people, and refused to allow the purchaser's people to seal and mark grain which had been reaped, and the ryots were assembled in such numbers and so armed that nothing could be done against them—*Held* by the High Court, that the acts of the defendants did not amount to an offence under s. 141, Penal Code.—4 Mad. H. C. R. 65.

72. The mere fact that a person thinks an act lawful which is not so is no defence to a violation of law. Forcibly to stop a procession is *primâ facie* an act of rioting.—7 Mad. H. C. R. 35.

S. 143.

73. Where an officer in charge of a police-station required the officer in charge of another police-station to cause a search to be made in a house within the limits of his station, and such officer, on being required, deputed two officers subordinate to him to make the search without delivering to them the order in writing required by s. 379,

Act X., 1872, it was held that the persons resisting the search attempted could not be lawfully convicted under ss. 353 and 143, Penal Code.—*Queen* v. *Narayan*, 7 N. W P. 309.

74. Where the charge was originally one of dacoity under s. 395, Penal Code, but during the progress of the case the charge under that section was lost sight of, and the accused were put on their defence on a charge of being members of an unlawful assembly under s. 143—*Held* that, had the complaint been one under s. 143, and not under s 395, it might have been made the subject of a summary trial under s. 222, Act X., 1872.—21 W. R., Cr., 89

75. Where cumulative sentences under ss. 143 and 353, Penal Code, were upheld.—16 W. R, Cr., 70.

S. 144

76. A sentence for being members of an unlawful assembly under s. 144, Act XLV, 1860, renders unnecessary separate sentences for house-trespass and mischief under ss. 448 and 427.—3 W. R, Cr, 54.

S 147

77. In investigating a case of land-dispute under ch. xxii, Act XXV., 1861, the Magistrate found that one party was in possession, but there being a charge against both parties of rioting under s 147, Penal Code, he punished both parties. *Held*, that the party in possession was protected by s. 104, Penal Code, in maintaining possession.—10 W. R., Cr, 64.

S. 148.

78. Rioting armed with deadly weapons and stabbing are distinct offences, and punishable separately under ss. 148, 149, and 324.—7 W. R., Cr., 60. See also 5 W. R., Cr., 19. But see 10 W. R, Cr., 63.

See S. 149.

79. Where an unlawful assembly (party A) attacked party B, who were in occupation of land, to drive them off the land by force, and one of the members of party A fired a gun at and killed one of the persons in party B in consequence of a sudden and unexpected resistance offered by party B, the persons composing party A (except the person who fired the gun) were held guilty, not of murder under s. 149, Penal Code, but of rioting under s. 148.—(F. B.) 20 W. R., Cr., 5.

S. 149.

80. S. 149, Penal Code, was not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object, but only for acts done with a view to accomplish the common object, or which the accused knew would be likely to be committed in prosecution of the common object.—(F. B.) 20 W. R., Cr., 5. See also 24 W. R., C. R., 66.

81. Two parties were convicted of rioting, one party consisted of not less than five persons, who were all found to have been assembled together in the fight which took place, and it was also found that they, as well as their opponents, came armed with sticks, prepared to fight, and did fight. *Held*, that they were not improperly convicted of rioting, their common object being to assault their opponents.

The other party only consisted of four persons. It was not found what object they had in common with the first party. The fight did not occur in a public place. *Held*, that they were not properly convicted of rioting. *Held* also, that had the fight occurred in a public place, it might have been held that the common object of both parties was to commit an affray.—*Queen* v. *Muzhar Hossein*, 5 N. W. P. 208.

82. Where a number of persons, members of an unlawful assembly, went to abduct A, and one of them killed B in the attempt to abduct A—*Held*, that all the persons concerned in the attempt at abduction were guilty, under s. 149, Penal Code, of causing the death of B.—13 W. R., Cr., 33.

83. Rioting armed with deadly weapons and stabbing are distinct offences and punishable separately under ss. 148, 149, and 324—7 W. R., Cr., 60. See also 5 W. R., Cr., 19. But see 10 W. R., Cr., 63.

S. 154.

84. Procedure to be observed in a case under s. 154, Penal Code.—15 W. R., Cr., 6.

S. 155.

85. A zemindar is not liable, under s. 155, Penal Code, for a sudden and unpremeditated riot which there is no reason to suppose he could have anticipated or thought likely to happen.—3 W. R., Cr., 54.

S. 160.

86. Prisoners were convicted of having committed an offence punishable under s. 160, Penal Code, and were sentenced to pay a fine of Rs. 25 each, or in default to be rigorously imprisoned for 30 days, the full term of imprisonment under the section. *Held* by a majority of the High Court (Kindersley, J., dissenting) that, having regard to the provisions of s. 309, Criminal Procedure Code (Act X. 1872), the sentence was legal.—*Regina* v. *Muhomad Saib*, I. L. R., 1 Mad. 277.

S. 161.

87. K, a police officer, employed in a Criminal Court to read the diaries of cases investigated by the police, and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided by the Court in which the persons accused were convicted, and a sum of money, the proceeds of the theft, had been made over by the order of the Court to the prosecutor in the case, asked for and received from the prosecutor a portion of such money, not as motive or reward for any of the objects described in s. 161, Penal Code, but as a "*dustori.*" *Held*, that K was not, under these circumstances, punishable under s. 161, Penal Code, but under s. 165 of that Code.—*Empress of India* v. *Kampta Prasad*, I. L. R., 1 All. 530.

88. Where the accused was charged under s. 116, Penal Code, with abetment of an offence punishable under s. 161, the person abetted having been a Civil Surgeon of a sudder station—*Held*, that the enhanced punishment prescribed by the latter part of s. 116 could not be awarded, as the Civil Surgeon was not a public servant within the meaning of that section.—21 W. R., Cr., 9.

89. A person who in fact, though wrongly, discharges the duties of an office whereby he is to all appearance a public servant, may as such be tried for receiving an illegal gratification under s. 161, Penal Code.—16 W. R., Cr., 27.

S. 169.

90. A police-officer, who has purchased a pony which had been impounded, is not guilty of criminal breach of trust, but should be proceeded against under s. 19, Act I., 1871, taken with s. 169, Penal Code.—16 W. R., Cr., 52.

S. 159.

74. A warrant issued under this section should be sealed, should describe the person to be apprehended under it with reasonable particularity so that there may be no difficulty in establishing his identity, and should be subscribed with the name and full official title of the Magistrate issuing it.—*In re Jones Hastings*, 9 Bom. H. C. R. 154.

Ss. 171, 172.

75. In order to lay a sufficient foundation for the issue of a proclamation under s. 185, Act XXV., 1861, and the accompanying order of attachment under s. 184, the Magistrate must, on some sufficient materials, find judicially that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him. *Semble.*—Per Phear, J.: The period of thirty days, which is prescribed in s. 183 as the minimum period within which the person is to be required by the proclamation to appear, runs from the date on which the publication in the mode prescribed by the same section should be effected, not from the date of the issue of the proclamation. The declaration of forfeiture directed to be made in s. 184 was intended to be in furtherance of a matter of procedure, and not simply as a mode of punishment for contempt of process; therefore, where it is not made before the person affected by the proclamation has come in, or has been brought in, it ought not to be made at all.—In the matter of the petition of *Ramkishar Sein*, 10 B. L. R. 14.

76. Absconding by a person against whom a warrant has been issued must be dealt with in the manner provided by law under the Code of Criminal Procedure, and not under s. 172, Penal Code.—*Queen* v. *Amir Jan*, 7 N. W. P. 302.

S. 186.

77. No advocate or attorney of the High Court or authorized pleader appearing in defence of an accused person is required to file a vakalutnama.—7 Mad. H. C. R. 41.

78. The practice of admitting private vakils to defend parties in Criminal Courts is not illegal. It is discretionary with Magistrates to hear such agents or not.—7 Mad. H. C. R. 37.

79. S. 186, Act X., 1872, was held not to apply to the case of an accused person who was deaf and dumb, in which the Deputy Magis-

trate who tried and convicted him considered that the accused did not understand the proceedings, whereas the Magistrate to whom the case was referred considered that he did.—19 W. R., Cr., 37. See also 22 W. R., C. R., 35 (two cases), 72.

80. A was convicted by the Joint-Magistrate of house-breaking by night with intent to commit theft, and the case referred under the provisions of s. 186, Act X., 1872, to the High Court for orders.

It appeared that G, whose understanding was of the most limited character, was caught at night in a house with some anklets in his possession. He was a lad of 15 or 16 years of age, and had been deaf and dumb from his birth. He sometimes lived with his father, and sometimes by begging, and there was little doubt that hunger had driven him to break into the house. He had never been in arrest before. The Court recommended that he should be made over to his father.—*Queen* v. *Ganga*, 7. N. W. P. 131.

S. 188.

81. The offences of enticing away a married woman with a criminal intent and of criminal breach of trust are not offences which may lawfully be compounded.—*Reg.* v. *Muthavan*, I. L. R., 1 Mad. 191.

82. An offence under s. 404, Penal Code, is not one of the class of offences which may be compounded.—7 Mad. H. C. R. 34.

S. 194.

83. No remand without a hearing can last for a longer period than fifteen days.—*Reg.* v. *Surkya valad Dhaku*, 5 Bom. H. C. R. 31.

S. 195.

84. A Magistrate having discharged an accused person cancelled his order, took further evidence, and committed him. *Held*, that the commitment was good, as the accused had not been prejudiced.—7 Mad. H. C. R. 40.

S. 196.

85. A Court of Session cannot treat as a nullity the commitment of a Magistrate, F. P., on the ground that he investigated the case, and committed the prisoner, without a formal complaint being made to him, but should proceed with the trial in the usual course.—*Reg.* v. *Ranchoddas Nathubhai*, 4 Bom. H. C. R. 35.

S. 204.

86. Where it becomes necessary to adjourn the hearing of a summons case, the attendance of the accused person at the adjourned hearing can be secured under the provision of s. 204, Act X., 1872.

Therefore, where a person appeared in answer to a summons requiring him to find security for good behaviour for one year, and the Magistrate adjourned the hearing of the case, in order that the accused person might produce evidence as to character, the Magistrate was empowered to take a personal recognizance from the accused person for his appearance at the adjourned hearing.—*Queen* v. *Chocha Rai*, 6 N. W. P. 366.

87. *Held*, that where the personal attendance of an accused is dispensed with, a recognisance bond, if such is deemed necessary, should be taken from him, and not from his agent, binding him (the accused) to appear, either in person or by an agent; and that a Magistrate has no legal authority to secure the attendance of an agent by such a bond.—*Reg.* v. *Lallubhai Jassubhai*, 5 Bom. H. C. R. 64.

S. 205.

88. This section applies only to summons cases.—4 Mad. H. C. R. 41.

89. The dismissal of a complaint under s. 67, Act XXV., 1861, is in the discretion of a Magistrate.—10 W. R., C. R., 50.

S. 207.

90. This section only requires the Magistrate to hear such witnesses as the accused shall produce in his defence.—4 Mad. H. C. R. 29.

S. 209.

91. Procedure to be followed by Magistrate in making an order for compensation under s. 209, Act X., 1872.—23 W. R., Cr., 64.

92. Where a formal charge has been drawn up, and the accused tried and acquitted, the acquittal should be one under s. 220, Act X. 1872, and not under s. 211, and therefore no amends can be awarded to the accused under s. 209 in such a case.—22 W. R., Cr., 12.

93. When a prosecutor fails to substantiate his charge by making contradictory statements, the Magistrate who tries the case under ch. xv., Criminal Procedure Code, can award compensation to the accused, although he commit the prosecutor to take his trial on a charge of giving false evidence.—*Queen* v. *Rupan Rai*, 6 B. L. R. 296.

94. On the day fixed for hearing of a complaint of trespass and assault made against three persons named, the complainant appeared with his witnesses, and the defendants also appeared; and on one of them being found to be a child of 8 years of age, the Magistrate dismissed the case without taking any evidence, and ordered compensation to be paid by the complainant to the defendants under s. 270, Act XXV., 1861. *Held*, the Magistrate was in error, and should not have dismissed the case merely because one defendant was a child. He should have followed the procedure laid down in ss. 265 and 266. Without hearing evidence he could not impose a fine under s. 270.—*Bilash* v. *Makroo*. 2 B. L. R. (S. N. XV.).

95. Though no amends can be granted to the accused under s. 270, Act XXV., 1861, for a frivolous charge of theft, yet a fine may be inflicted on the accused.—1 W. R., Cr., 1. See also 2 W. R., Cr., 57; (4 R. J. P. J. 366); 3 W. R., Cr., 70; 6 W. R., Cr., 54; 7 W. R., Cr., 12, 40.

96. A Court of original jurisdiction only can exercise the power, and not an appellate Court.—8 Mad. H. C. R. 7.

97. The power of awarding compensation for a frivolous or vexatious complaint is limited to summons cases.—5 Mad. H. C. R. 40.

98. Magistrates of the second class have no power to award fines to accused as compensation for frivolous and vexatious prosecutions, except in cases in which a summons on complaint shall ordinarily issue.—*Reg* v. *Yellappa bin Mudakappa*, 1 Bom. H. C. R. 181.

99. Amends, under s. 209, Criminal Procedure Code, are awardable only in cases triable by the Magistrate in which a summons on complaint shall ordinarily issue.—*Reg.* v. *Ramji valad Daji*, 5 Bom. H. C. R. 12.

100. Where a complaint being preferred to a Magistrate of an offence not coming within ch. xvi., Code of Criminal Procedure, the Magistrate alters it so as to bring it under that chapter, he cannot award compensation, the offence originally complained of not being one for which compensation can be awarded.—*Reg.* v. *Gurningappa et al*, 7 Bom. H. C. R. 58.

101. An award of compensation to the widow of a person who died in consequence of a fall into a pit, negligently dug by the accused, from the fine imposed upon the latter, is illegal.—*Reg.* v. *Shivbassappa*, 7 Bom. H. C. R. 73.

ACT II. OF 1880.

THE BURMA DISTRICT CESSES AND RURAL POLICE ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[Received the Governor-General's assent on the 24th January 1880.]

THIS Act contains 24 sections, and comes into force on such date as the Chief Commissioner of British Burmah, by notification in the local Gazette, may direct.—ED., *L.C.*

ACT III. OF 1880.

THE CANTONMENTS ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[Received the Governor-General's assent on the 30th January 1880.]

AN ACT TO AMEND THE LAW RELATING TO CANTONMENTS.

Preamble.

WHEREAS it is expedient to amend the law relating to cantonments; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Cantonments Act, 1880."

Local extent.

This section, section two and section twenty-four apply to the whole of British India. The remaining portions of this Act extend to the whole of British India except the territories respectively administered by the Governor of Fort St. George in Council and the Governor of Bombay in Council. The Governor of Fort St. George in Council or the Governor of Bombay in Council may, by notification in the official Gazette, extend any such portion to any place under his administration; and, from the date on which any such portion is so extended to any place, such of the enactments for the time being in force in such place as are in any way inconsistent with, or repugnant to, such portion shall cease to have effect in such place.

Enactments inconsistent with this Act in Madras and Bombay cantonments.

Repeal of Act XXII. of 1864.

2. Act No. XXII. of 1864 (*to provide for the administration of Military Cantonments*) is hereby repealed; but all orders, declarations, rules and regulations made, powers conferred, and Courts established under that Act, shall be deemed to be respectively made, conferred and established under this Act.

References to Act XXII. of 1864.

All references to the said Act No. XXII. of 1864 in enactments passed subsequently thereto shall be read as if made to this Act.

CHAPTER II.

CRIMINAL JURISDICTION.

Cantonment Magistrate.

3. Every person invested by the Local Government, under the Code of Criminal Procedure, with the powers of a Magistrate of the first class within the limits of any cantonment, shall be styled the Cantonment Magistrate, and shall be deemed a Magistrate in charge of a division of a district within the meaning, and for the purposes, of the said Code.

Assistant Cantonment Magistrate.

4. Every person invested by the Local Government, under the provisions of the said Code, with the powers of a Magistrate of the second or third class within the limits of any cantonment, shall be styled the Assistant Cantonment Magistrate.

CHAPTER III.

CIVIL JURISDICTION.

Small Cause jurisdiction of Cantonment Magistrate.

5. Whenever the Local Government establishes within the limits of any cantonment a Court of Small Causes under Act No. XI. of 1865 (*to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original Civil jurisdiction of the High Courts of Judicature*), the Cantonment Magistrate, if there be a Cantonment Magistrate, shall be the Judge of the Court so established.

The Local Government shall declare and may from time to time alter the pecuniary limit of the jurisdiction of every such Court, but such limit shall in no case exceed five hundred rupees.

6. The Local Government may invest any Assistant Cantonment Magistrate with the powers of a Judge of a Court of Small Causes to try suits instituted in any Court referred to in section five; provided that no Assistant Cantonment Magistrate shall have jurisdiction to try suits for an amount exceeding fifty rupees.

Small cause jurisdiction of Assistant Cantonment Magistrate.

7. All the provisions of the said Act shall be applicable to every such Court, and to all suits instituted in any such Court, except as is herein otherwise provided.

Act XI. of 1865 to apply to all Small Cause Courts in cantonments.

8. Whenever a Court of Small Causes is established in any cantonment, the jurisdiction exercised in such cantonment by any officer under Act No. III. of 1859 *(for conferring Civil Jurisdiction in certain cases upon Cantonment Joint Magistrates)* shall cease and so much of any Act as authorizes the commanding-officers of stations or cantonments to convene military courts of requests for the trial of actions of debt and other personal actions, shall cease to have effect within the limits of such cantonment.

Military Courts of Requests.

CHAPTER IV.

POLICE.

9. The Police-force employed in any cantonment shall be deemed to be part of the general Police-force under the Local Government in whose territories such cantonment is situate, within the meaning of Act No. V. of 1861 *(for the Regulation of Police)*, section two, and all the provisions of the said Act shall be applicable to such force.

Act V. of 1861 applicable to Police employed in cantonments.

The administration of the Police within the limits of any cantonment in which there is a Cantonment Magistrate shall be vested in the District Superintendent subject to the general control and direction of the commanding-officer of such cantonment.

Administration of Police within cantonments.

10. The Local Government may extend section thirty-four of the said Act No. V. of 1861 to any cantonment situate in the territories administered by such Government.

Extension of section 34, Act V. of 1861, to cantonments.

11. The commanding-officer of a cantonment may send any process requiring service or execution by any means not immediately at his disposal to the chief Police-officer in the cantonment for service or execution through the cantonment-police; and the said chief Police-officer shall serve or execute such process in the same manner as if it had been issued by the Cantonment Magistrate, and subject to the same rules.

Service of process sent by commanding-officer of cantonment.

12. The Local Government may, by notification in the official Gazette, extend the provisions of Act No. XX. of 1856 *(to make better provision for the appointment and maintenance of Police Chaukídárs in Cities, Towns, Stations, Suburbs and Bazars in the Presidency of Fort William in Bengal)*, to any cantonment to which a Cantonment Magistrate may be appointed; and the Cantonment Magistrate of any cantonment to which the said Act is so extended may exercise all the powers vested in a Magistrate by that Act subject only to the control of the Magistrate of the District and the Local Government.

Power to extend Act XX. of 1856 to cantonments.

Whenever any such Cantonment Magistrate is absent, or when his office is temporarily vacant, the Magistrate of the district shall, during such absence or until the Local Government fills up the vacancy, carry out the provisions of the same Act when so extended as aforesaid.

13. The Local Government may order that any cantonment to which the provisions of the said Act No. XX. of 1856 are extended shall be divided into any number of cantonment-divisions, and may determine the nature of the tax to be levied in each such division according to section ten of the same Act.

Power to order division of cantonments, &c.

CHAPTER V.

Spirituous Liquors.

14. If within any cantonment, or within any limits around such cantonment prescribed by the Local Government, any person not amenable to the Articles of War, or any sutler or camp-follower, knowingly barters, sells or supplies, or offers or attemps to barter, sell or supply, any spirituous liquor, wine or intoxicating drug to, or for the use of, any European soldier, or to or for the use of any European or Eurasian being a camp-

Unauthorised sale of spirituous liquor.

follower or a soldier's wife, without a written license from the Officer Commanding or from some person authorized by the Officer Commanding to grant such license, the person so bartering, selling or supplying, or offering or attemping to barter, sell or supply, such liquor, wine or drug, shall be liable on conviction to fine which may extend to one hundred rupees, or to imprisonment for a term which may extend to three months, or, in lieu of such fine or imprisonment, to the punishment of whipping, as prescribed for offences under section 2 of Act No. VI. of 1864 *(to authorize the punishment of whipping in certain cases)*, subject to all the provisions of that Act.

Presumption in case of second conviction.

15. If any person convicted of an offence under section fourteen is again convicted of an offence under that section, any spirituous liquor, wine or intoxicating drug within such cantonment or limits which, at the time of the commission of such subsequent offence, belongs to him, or is in his possession shall, without further proof, be deemed to be in his possession for the purpose of being supplied to European soldiers contrary to the provisions of this Act.

Penalty on certain persons having in possession within cantonments more than certain quantity of spirituous liquor, &c., without permit.

16. If within such cantonment or limits any camp-follower or military pensioner, or the wife or the widow of any soldier, camp-follower or military pensioner, removes, conveys or has, in his or her possession, any quantity of spirituous liquor or wine exceeding one ser or quart, without a permit to be signed by the officer in command, or such other officer as may be appointed by him to grant permits under this Act, every such person shall be liable upon conviction to fine which may extend to fifty rupees, and for any subsequent offence to fine which may extend to one hundred rupees, or to imprisonment for a term which may extend to three months: provided that nothing in this section contained shall apply to any liquor brought into a cantonment for the private use of any commissioned officer.

Arrest of offenders under section 14 or 16, and seizure of spirituous liquor, &c.

17. If any person subject to the provisions of this Act is found committing any offence contrary to section fourteen or section sixteen, any police-officer may immediately without warrant arrest such person, and also seize any spirituous liquor, wine, or intoxicating drug, together with any vessel containing the same, and anything used for the

purpose of removing, conveying, or concealing the same, which may be found in his possession, and shall thereupon without delay take such person, together with the things so seized, before the Cantonment Magistrate or other officer having jurisdiction to punish the offender.

Confiscation of such liquor, &c.

18. In case of a conviction for any offence under section fourteen or section sixteen, the Cantonment Magistrate or other officer may adjudge any liquor, wine, or intoxicating drug in respect of which the accused is convicted, and any other spirituous liquor, wine, or intoxicating drug found in his possession at the time of committing the offence, and any vessel containing the same, together with anything used for the purpose of conveying, removing, or concealing the same, or any part thereof, to be confiscated; and such Magistrate or officer may order the whole or any part or parts of any fine imposed under this Act to be paid, as soon as the same is realized, to the person upon whose information such conviction takes place, or to the officer who has apprehended the offender or seized any of the goods adjudged to be confiscated.

Detention of property seized.

19. Anything seized under section seventeen in respect of which any person is charged with an offence under this Act may be ordered to be detained until the person in whose possession the same has been seized is convicted or acquitted of the offence charged.

Disposal of property seized.

If such person is acquitted, anything so seized shall be restored; if he is convicted, such of the things only, if any, as are not adjudged by the Cantonment Magistrate or other officer to be confiscated, shall be restored: the remainder shall be dealt with as confiscated.

Saving of articles sold or supplied for medicinal purposes.

20. The foregoing sections shall not apply to the sale or supply of any article for medicinal purposes by recognized medical practitioners, chemists, or druggists.

CHAPTER VI.

MUNICIPAL TAXATION.

General power of taxation.

21. The Local Government may from time to time, with the previous sanction of the Governor-General in Council, by notification in the official Gazette, impose in any cantonment any tax which, under any enactment in force

at the date of such notification, can be imposed in any municipality within the territories administered by such Government, and may, with the like sanction and by a like notification, abolish any tax so imposed.

Power to provide for assessment and collection of taxes.

22. When any tax is leviable in a cantonment under section twenty-one, the Local Government may from time to time, by notification in the official Gazette, apply or adapt to such cantonment the provisions of any enactment or rules in force at the date of such notification for the assessment and recovery of any tax in any municipality within the territories administered by such Government.

Application of proceeds of taxes.

23. The proceeds of all taxes levied in any cantonment under section twenty-one shall, after defraying therefrom the cost of assessing and collecting the same, be applied in such cantonment, under the directions of the Local Government, to the maintenance of the police-force and the carrying out of measures under the rules made under section twenty-five.

Power to prohibit taxation in cantonments.

24. Notwithstanding anything contained in any enactment for the time being in force, the Governor-General in Council may, by an order in writing, prohibit the levy of the whole or any part of any tax in any cantonment, or exempt any person by name or in virtue of his office, or any class of persons, from the operation of any such tax, and may, by a like order, resind any such prohibition or exemption.

CHAPTER VII.

SUBSIDIARY RULES.

Power to make cantonment-rules.

25. The Local Government may from time to time makes rules consistent with this Act to provide within the limits of any cantonment for the matters hereinafter mentioned.

Rules may be general or special.

The rules made under this section may be general for all cantonments in the territories administered by the Local Government making the same, or special for any one or more of such cantonments, according as the Local Government directs.

26. No rule made under section twenty-five shall have effect until the same has been confirmed by the Governor-General in Council. A copy of every such rule when so confirmed, in English and in the vernacular language chiefly in use, shall be hung up in some conspicuous part of the office of the Cantonment Magistrate, or in such other place as the Local Government or the commanding-officer directs.

Rules to be confirmed by Governor-General in Council.

For what matters rules may provide.

27. The rules made under section twenty-five may provide for all or any of the following matters:—

1st—regulating, in cases in which the land within the limits of the cantonment is the property of Government, and the occupation and use of which by private persons is only permissive, the conditions under which such occupation or use shall be allowed, and under which the Government may resume possession of such land, and under which compensation shall be given to persons occupying or using the land so resumed;

2nd—maintaining proper registers of immoveable property within the limits of the cantonment, and providing for the registration of transfers of such property;

3rd—regulating the manner in which houses within the limits of the cantonment shall be claimable for purchase or hire, when necessary, for the accommodation of military officers;

4th—regulating the management and expenditure of any funds made available by law or by the Government for the purpose of public improvements within the limits of the cantonment, or for carrying out any rules made under section twenty-five; and the appointment of the necessary servants and establishments;

5th—the definition and prohibition of public nuisances;

6th—the maintenance generally of the cantonment in a proper sanitary condition; the prevention and cure of disease; the management and regulation of the public roads, of conservancy and drainage; the regulation and inspection of public and private necessaries, urinals, cess-pools, drains, and all places in which filth or rubbish is deposited, of slaughter-houses, public markets, burial and burning grounds, and of all offensive or dangerous trades and occupations;

7th—inspecting and controlling brothels and preventing the spread of venereal disease;

8th—the supervision and regulation of public wells, tanks, springs or other sources from which water is or may be made available for public use;

9th—the execution and promotion of works of public utility and convenience;

10th—the registration of deaths, and the making and recording observations and facts important for the public health and interest;

11th—the imposition of penalties on persons convicted of the breach of any rule made under section twenty-five, and declaring what persons shall make the preliminary inquiry into or take cognizance of any breach of such rules and the manner in which the investigation shall be conducted: provided that no penalty so imposed shall exceed a fine of fifty rupees, or imprisonment for eight days.

Trial of breaches of rules.

28. Breaches of any rule made under section twenty-five shall be triable by the Cantonment Magistrate when there is such an officer: but the Local Government may invest any Assistant Cantonment Magistrate, or any other person, with powers to try such breaches, and may authorize such person to exercise such powers independently of the Cantonment Magistrate

There shall be no appeal in any case tried under this section; but every person trying any such case shall, for the purposes of Chapter XXII. of the Code of Criminal Procedure, be deemed to be subordinate to the High Court, the Court of Session, and the Magistrate of the District.

Fine how levied.

29. In every case in which an offender is sentenced to a fine for the breach of any rule made under section twenty-five, the amount may, in case of non-payment, be levied by distress and sale of any moveable property of the offender which may be found within the limits of the cantonment.

Imprisonment in case fine not levied

If no such property sufficient for the payment of the fine can be found, the offender shall be liable to simple imprisonment for any term which may extend to one month.

Prosecutions, &c, under other enactments.

30. Nothing in this Act, nor in any rule made under section twenty-five, shall prevent any person from being prosecuted under any other enactment for any offence punishable under this Act, or from being liable under any other

enactment to any other or higher penalty than is provided for such offence by this Act. Provided that no person shall be punished twice for the same offence.

Extension of rules as to brothels and venereal disease.

31. Whenever it appears necessary for the protection of the health of the troops in any cantonment, the Governor-General in Council may extend to any place outside the limits of such cantonment, and in the vicinity thereof, all or any of the rules made for such cantonment for inspecting and controlling brothels and preventing the spread of venereal disease and make any additional rules consistent with this Act for providing for the same matters, and may define the limits around such cantonment within which such rules or additional rules shall be in force.

Penalties for breach of rules in extended limits.

32. When such rules, with any additional rules made as aforesaid, are extended under section thirty-one to any place outside the limits of such cantonment, the Governor-General in Council may provide, in the manner described in clause eleven of section twenty-seven, for the imposition of penalties for the breach of such rules and for prescribing the manner in which, and the persons by whom, breaches of such rules shall be inquired into or be cognizable.

Effect of cantonment-rules on enactments previously in force.

33. Whenever in any cantonment, rules have been made under section twenty-five, so much of any enactment as may be held to empower the commanding-officer to make local regulations regarding matters other than military shall cease to have any effect in such cantonment, and all local regulations for any cantonment which may have been made before the promulgation of the rules for such cantonment made under section twenty-five shall cease to have any effect.

Saving of jurisdiction of Courts-martial, &c.

34. Nothing in the foregoing sections shall be deemed to affect the jurisdiction or military authority of Courts-martial or of commanding-officers of cantonments or of regiments, corps, or detachments under any Articles of War, or the provisions of any Statute for punishing mutiny and desertion of officers and soldiers in the service of Her Majesty in the East Indies; and the Cantonment Magistrate shall exercise no jurisdiction in respect of such offences.

Provided that, when a Cantonment Magistrate or other officer not being the commanding-officer has been invested by the Local Government with power within the limits of any cantonment to dispose of cases under any rule made under section twenty-five, the commanding-officer shall not exercise the powers described in clause *(c)* of Part III of the Indian Articles of War in respect of any case arising under such rule when such rules have been passed for such cantonment under section twenty-five and penalties have been laid down for their infringement.

The said rules shall be held to be the rules mentioned in the said last mentioned clause, and so much of the same clause as declares the penalties which may be inflicted for breach of cantonment-regulations shall cease from that time to have any effect in such cantonment.

35 The Local Government may from time to time prescribe rules for regulating the expenditure, for the general purposes of this Act, of any funds raised under the said Act No XX. of 1856. Such funds may be expended for the purpose of carrying out any measures under any of the rules made under section twenty-five or section thirty-one of this Act, in addition to or in lieu of the purposes described in section thirty-six of the said Act No. XX of 1856.

Power to prescribe rules as to expenditure of funds raised under Act XX of 1856

ACT IV. OF 1880.

THE PORTUGUESE TREATY ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the Governor-General's assent on the 30th January 1880.

THIS Act is intended to give effect to the convention between the Governor-General of British India and Portuguese India regarding the extradition of criminals, and to the twentieth article of the treaty between Her Majesty and the King of Portugal and the Algeroes.—ED., *L. C.*

ACT V. OF 1880.

THE BURMA BOUNDARIES ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the Governor-General's assent on the 20th February 1880.*]

This Act contains 32 sections, and comes into force at once.—ED., *L. C.*

ACT VI. OF 1880.

THE INDIAN LICENSE ACTS AMENDMENT ACT, 1880.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the Governor-General's assent on the 2nd March 1880.

AN ACT TO AMEND THE LAW RELATING TO THE LICENSING OF TRADES AND DEALINGS.

Preamble.

WHEREAS it is expedient to amend the law at present in force for the licensing of trades, dealings and industries in certain parts of British India; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian License Acts Amendment Act, 1880."

The Northern India License Act, 1878.

Repeal of portions of Northern India License Act. 1878.

2. The following portions of the Northern India License Act, 1878, are hereby repealed, that is to say—

the portion of section one from and including the words "but nothing herein contained" to the end; section two;

and the portion of the schedule from and including the words and figures "class III" to the end.

Addition to section 3 of same Act.

3. In the same Act, to section three the following shall be added, that is to say—

'Trade,' 'dealing' and 'calling.'

"In this Act the word 'trade,' 'dealing' or 'calling' shall not be deemed to include the following, that is to say—

"(a) agriculture;

"(b) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market;

"(c) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, when he does not keep a shop or stall for the sale of such produce."

Substitution of new section for section 4 of same Act.

4. In the same Act, to section four the following shall be added, that is say—

"Provided that, if such person carries on such trade or dealing in more than one such district, he shall take out such license in the district in which his principal place of business in the said territories is situate.

"When any question arises as to what shall, for the purposes of this Act, be deemed to be the principal place of any business, the Governor-General in Council, or such authority as the Governor-General in Council may from time to time appoint in this behalf, shall decide such question, and his or its decision thereof shall be final."

Amendment of sections 6, 7 and 8 of same Act.

5. In sections six, seven and eight of the same Act, for the words "such district," wherever they occur, the words "the said territories" shall be substituted.

Amendment of section 7 of same Act.

6. In section seven of the same Act, for the words "first day of January," the words "thirty-first day of March" shall be substituted.

Amendment of sections 9 and 10 of same Act.

7. In sections nine and ten of the same Act, for the figures "1878" the figures "1880" shall be substituted.

In section ten of the same Act, for the word "thirty," the word "sixty;" and for the word "February," the word "June" shall be substituted.

Madras License Act, 1878.

Repeal of portions of Madras License Act, 1878.

8. In section five of the Madras License Act, 1878, the words "and whose annual nett earnings or profits exceed two hundred rupees," and the portion of the schedule of the same Act from and including the words and figures "class XII," to the end, are hereby repealed.

Substitution of new section for section 3 of same Act.

9. In the same Act, for section 3, the following section shall be substituted:—

'Trade,' 'dealing' or 'industry' defined.

"In this Act the word 'trade,' 'dealing' or 'industry' shall not be deemed to include the following, that is to say—

"(a) agriculture;

"(b) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market;

"(c) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, when he does not keep a shop or stall for the sale of such produce."

Amendment of section 8 of same Act.

10. In section eight of the same Act, for the words "first day of January," the words "thirty-first day of March" shall be substituted.

In the same Act "1880" substituted for "1878."

11. In sections ten and eleven of the same Act, for the figures "1878," the figures "1880" shall be substituted.

Amendment of section 11 of same Act.

12. In section eleven of the same Act, for the word "March" in both places in which it occurs, the word "June" shall be substituted.

The Bombay License Act, 1878.

Amendment of sections 1 and 2 of Bombay License Act, 1878.

13. In section one of the Bombay License Act, 1878, the words "but nothing herein contained applies to persons earning their livelihood solely by agriculture" are hereby repealed; and to section two of the same Act the following words shall be added:—

'Trade,' 'dealing,' 'industry,' 'calling,' 'occupation,' defined.

"and the word 'trade,' 'dealing,' 'industry,' 'calling,' or 'occupation' shall not be deemed to include the following, that is to say—

"(a) agriculture;

"(b) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market;

"(c) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, when he does not keep a shop or stall for the sale of such produce."

In the same Act, "1880" substituted for "1878."

14. In sections nine and ten of the same Act, for the figures "1878" the figures "1880" shall be substituted.

Amendment of sections 7 and 11 of same Act.

15. In section seven of the same Act, for the words "first day of January," the words "thirty-first day of March" shall be substituted;

and in section ten of the same Act, for the word "thirty" where it first occurs, the word "sixty" shall be substituted, and for the words "within thirty days next after the first of January," the words "before the first day of June" shall be substituted.

Amendment of schedule A of same Act.

16. In schedule A annexed to the same Act, for the words and figures "Companies registered under the Indian Companies Act, 1866," the words "Joint Stock Companies" shall be substituted.

Amendment of schedule B of same Act.

17. In schedule B annexed to the same Act, the words and figures "class XII, Rs. 7, class XIII, Rs. 5, class XIV, Rs. 3, class XV, Rs. 2," are hereby repealed.

General.

Recovery of money due when Act passes.

18. Notwithstanding anything hereinbefore contained, any money due at the time of the passing of this Act, under any of the Acts hereby amended, may be recovered as if this Act had not been passed.

Trade, &c., carried on in various parts of British India.

19. When any person is engaged in any trades, dealings, industries or callings in two or more of the local areas to which the several Acts hereby amended and the Bengal License Act for the time being in force respectively extend, and is thereby liable to pay fees under two or more of such Acts, he shall, if the Governor-General in Council so directs, be chargeable with a fee only under such one of those Acts as the Governor-General in Council may direct, and the amount of such fee shall be calculated as if he was engaged in all such trades, dealings, industries and callings within the local area to which such Act applies.

A direction under this section may be given by general rule or special order.

5. These principles, of the highest importance, yet too obvious almost for statement but that they have been called in question by an eminent authority, are, as we think, misrepresented, or at least not correctly presented, by the comparison drawn between legislation and house-building. No one, we suppose, would be so foolish, except in a simile, as to say, "I will first build the rooms I want, and then devise the ground-plan of the house." What a sensible man, having a reasonable anticipation of his future fortune and necessities with limited present means, would do would be to build room after room as he could afford it according to a plan laid down from the first, but not so immutably fixed as to admit of no adaptation to circumstances. This is the analogy, if any, which we think ought to be drawn; and if, coming closer to the matter in hand, we could suppose the English law to have been fostered and controlled in its earlier stages by a wide and clear apprehension of general principles, it is impossible to doubt that it would have conferred through many generations greater blessings, at a much less cost, than in fact it has done to the people amongst whom it grew up. The Roman law, being in theory a *jus gentium*, freed so far as its constructors could free it from the narrowing peculiarities of a particular people, has been found more rich in general principles covering a variety of circumstances than the insular product of our own history and character. From the English law, then, we must not take at random, but choose such materials and such models for the structure we have to raise in India as will fit appropriately into a design, however remote in its accomplishment, congruous and symmetrical in the relation of its parts, and adapted, as far as human foresight extends, to the place, to the people, and to their hoped-for share in the general progress of civilized men.

6. We would not have it supposed that in thus vindicating the beneficial effect, and the necessity even, of a constant attention to uniform and expansive general principles in legislation, we in any way underrate the importance of the historical and practical elements of the work. The growth of law is always going on. It is the upshot of a contention, ever renewed, of rival interests and conflicting tendencies of thought. It thus reflects the material and moral growth of the nation. The historical element of existing law as disclosed in actual usage and the decisions of the Courts as well as in special legislation must never therefore be disregarded. But by the aid of comparative jurisprudence we may

arrive at such clear conceptions of the life, growth, and death of legal ideas in the several stages of social and moral progress that we can with a great degree of probability forecast what is already, and will more certainly be, felt as an incumbrance, and remove it. We may determine, at least approximately, what will fit into the general sphere of national thought of which the legal region is but a segment, and introduce it from another system in which it has already been submitted to experiment. We may labour with a fuller consciousness of the general ends to be pursued so as to work parallel to the legislation of the most advanced and prosperous countries. It is of the nature of the human mind and character to be deeply impressed by an orderly development of consequences from received principles, even when that development takes a course different from what unaided instinct and the first rude necessities of practice would have suggested. Thus by timely legislation, taking just account of existing legal conditions as an outgrowth of the past and a necessary basis of the future, we may save the community many painful experiences, put it into possession of the fruits of others' labours and pains, and hasten by whole generations its entry into the great procession of the nations towards a uniformity of laws founded on uniformity in the conception of right and of the essential elements of human welfare.

7. In attempting to carry out such a scheme, it is, perhaps, more difficult to determine, at any given moment, exactly what legal needs exist to be satisfied than to devise the laws which for the time will satisfy them. It is still harder to determine in what precise form and measure an infusion from a foreign system is capable of forming a vital adhesion to the existing body so as to supply an obvious deficiency, or even give a stimulus to its natural growth. The legislature, then, should be in close and appreciative communication with the felt necessities and the active thought of the society for which it is to work. It must be quick to discern permanent tendencies amongst the temporary fluctuations of popular impulse. Without binding itself in the trammels of what has grown effete, it must recognize the existing state of facts as a main element of the structure to be raised, and mould them into a symmetrical fabric with the more universal element drawn from general jurisprudence. Hence a necessity not only for an acquaintance with the contents and the working of past laws, but for a thorough insight into the actual circumstances of the community both in their mutual rela-

tion as physical facts and in the way they are conceived by the mind of the people, in the wishes and aims thus generated, and in the moral preparation made by them for the reception of some new development or some new combination of principles. When we see the untiring care and precision with which the grounds of chemical or mechanical science are investigated, and the observations and experiments verified again and again before a fact is admitted finally as the ground-work of a law, a sense of surprise is awakened at the coarse and slovenly inductions, or the purely *à priori* assumptions, on which the spirit of system is too often content to build in the science of human action. The true use of a system is to co-ordinate the facts, not to neglect or in an arbitrary way to admit or to exclude them. The true purpose of a Code is to further the moral and material progress of a people by fostering a general harmony of thought and action, and by employing all the means afforded by existing conditions for ensuring a future amelioration. There must, then, be exact and sympathetic observation leading to true insight; there must be development; there must also be adoption and appropriation; but all without waste of force, and without neglect of any element which by its unacknowledged presence will set all calculations at fault.

8. In India itself a different set of objections has been raised to any attempt at scientific legislation. Collect, it is said, and group the existing facts of custom and practice, and leave the future wholly to natural development. The answer is that, essential as an exact ascertainment of the facts of the society and of their true relations is to the legislator, a sound theory is just as essential. It is a sound and comprehensive theory which in legal as in physical science alone gives life to the materials which it embraces. Such a theory in any department of human thought can be formed only by careful and continued reflexion on a copious store both of facts and of subsidiary theories by which the facts are viewed and classed according to various methods of arrangement. It implies the exercise of intelligence unbiassed by any predilection except for the truth, a readiness to accept all the teachings of experience, where it points out what is immediately expedient as well as what is permanently necessary. The contempt for theory which is felt by some men of considerable observing powers is, in truth, a contempt for all that makes their observations valuable. They are themselves the slaves, not unfrequently, of partial theories

qualified by mere inconsistencies, which can be reconciled only by reference to some higher point of union at which a wider generalization stands ready to reconcile seemingly discordant facts. A mere empirical acquaintance with affairs may become a snare in the presence of new combinations; and in meeting the foreseen difficulties of the future, it is unsafe to yield to the suggestions of unsystematic thought, or of no thought at all, which are dear to indolence, dogmatism, and mental impatience.

9. Objections of the kind that we have just been considering have in the last few years been urged so strongly, and even vehemently, in this country against all comprehensive legislation whatever, that we may be pardoned for examining the arguments that have been employed by reference in somewhat more detail to the teachings of history and of social science. It would seem as though a reaction of lassitude had quenched the energies of many distinguished administrators when we find them shrinking from projects which a few years ago they would have heartily welcomed. Legislation generally has for the time become distasteful; scientific legislation a kind of bugbear. It seems to be thought that the effort of grasping the new necessities can be avoided by a simple folding of the hands: it is overlooked that the times of great administrative progress in India have been the times also of great legislative activity. Society, it is in substance asserted, can provide for its jural needs without any intervention of the legislature; and such intervention, being unnecessary, will almost certainly be mischievous. That there is much that is plausible in these arguments cannot be denied; but we believe they have no solid foundation, and would hardly have been thought of but for their accordance with the tendency which for the moment is dominant in the minds of their authors. We think that active legislation is essential to the political health of a growing society; that it meets needs which cannot otherwise be satisfied, and that the more systematic it is, provided the system itself is a moderately good one, the more beneficial it will be in its operation and influence.

(To be continued.)

39. Horse-faced sylvans, apes, fish, and a variety of birds, tame cattle, deer, men, and ravenous beasts with two rows of teeth;

40. Small and large reptiles, moths, lice, fleas, and common flies, with every biting gnat, and immovable substances of distinct sorts.

41. Thus was this whole assemblage of stationary and movable bodies framed by those high-minded beings, through the force of their own devotion, and at my command, with separate actions allotted to each.

42. Whatever act is ordained for each of those creatures here below, *that* I will now declare to you, together with their order in respect to birth.

43. Cattle and deer, and wild beasts with two rows of teeth, giants and blood-thirsty savages, and the race of men, are born from a secundine;

44. Birds are hatched from eggs, *so are* snakes, crocodiles, fish *without shells*, and tortoises, with other animal kinds, terrestrial, *as chamelions*, and aquatick, *as shell-fish:*

45. From hot moisture are born biting gnats, lice, fleas, and common flies; these, and whatever is of the same class, are produced by heat.

46. All vegetables, propagated by seed or by slips, grow from shoots: some herbs, abounding in flowers and fruits, perish when the fruit is mature;

47. Other plants, called lords of the forest, have no flowers, but produce fruit; and, whether they have flowers also, or fruit only, *large woody plants* of both sorts are named trees.

48. There are shrubs with many stalks from the root upwards, and reeds with single roots but united stems, all of different kinds, and grasses, and *vines or* climbers, and creepers, which spring from a seed or from a slip.

49. These *animals and vegetables*, encircled with multiform darkness, by reason of past actions, have internal conscience, and are sensible of pleasure and pain.

50. All transmigrations, recorded *in sacred books*, from the state of BRAHMA, to that of plants, happen continually in this tremendous world of beings; a world *always* tending to decay.

51. HE, whose powers are incomprehensible, having thus created both me and this universe, was again absorbed in the supreme Spirit changing *the* time *of energy* for *the* time *of repose*.

52. When that Power awakes *(for though slumber be not predicable of the sole eternal Mind, infinitely wise and infinitely benevolent, yet it is predicated of* BRAHMA, *figuratively, as a general property of life)*, then has this world its full expansion, but, when he slumbers with a tranquil spirit, then the whole system fades away;

53. For, while he reposes, *as it were*, in calm sleep, embodied spirits, endued with principles of action, depart from their several acts, and the mind itself becomes inert;

54. And when they once are absorbed in that supreme essence, then the divine soul of all beings withdraws his energy, and placidly slumbers;

55. Then too this vital soul *of created bodies*, with all the organs of sense and of action, remains long immersed *in the first idea or* in darkness, and performs not its natural functions, but migrates from its corporeal frame:

56. When, being *again* composed of minute elementary principles, it enters at once into vegetable or animal seed, it then assumes a *new* form.

57. Thus that immutable Power, by waking and reposing alternately, revivifies and destroys in eternal succession, this whole assemblage of locomotive and immovable creatures.

58. HE, having enacted this code of laws, himself taught it fully to me in the beginning: afterwards I taught it MARICHI and the *nine* other holy sages.

59. This *my son* BHRIGU will repeat the divine code to you without omission; for that sage learned from me to recite the whole of it

60. BHRIGU, great and wise, having thus been appointed by MENU to promulge his laws, addressed all the *Rishis* with an affectionate mind, saying: Hear!

61. FROM this MENU named SWA'YAMBHUVA, or *Sprung from the self-existing*, came six descendants, other MENUS, *or perfectly understanding the scripture*, each giving birth to a race of his own, all exalted in dignity, eminent in power;

62. SWA'RO'CHISHA, AUTTAMI, TA'MASA, RAIVATA likewise and CHA'CSHUSHA, beaming with glory, and VAIVASWATA, child of the sun.

SUPPLEMENT.

EXTRACTS.

RELIGIOUS CONGREGATIONS BILL.

Abstract of the proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 and 25 Vic., cap. 67.

(Supplement to the Gazette of India, January 17, 1880.)

The Council met at Government House on Friday, the 9th January 1880.

PRESENT:

His Excellency the Viceroy and Governor-General of India, G.M.S.I., *presiding.*
His Honor the Lieutenant-Governor of Bengal, K.C.S.I.
His Excellency the Commander-in-Chief, G.C.B., G.C.S.I., C.I.E.
The Hon'ble Sir A. J. Arbuthnot, K.C.S.I., C.I.E.
Colonel the Hon'ble Sir Andrew Clarke, R.E., K.C.M.G., C.B., C.I.E.
The Hon'ble Sir J. Strachey, G.C.S.I., C.I.E.
General the Hon'ble Sir E B. Johnson, R.A., K.C.B., C.I.E.
The Hon'ble Whitley Stokes, C.S.I., C.I.E.
The Hon'ble Rivers Thompson, C.S.I.
The Hon'ble Sayyad Ahmad Khan Bahádur, C.S I.
The Hon'ble T. C. Hope, C.S.I.
The Hon'ble B. W. Colvin.
The Hon'ble Mahárájá Jotindra Mohan Tagore, C.S.I.
The Hon'ble G. H. M. Batten.
The Hon'ble C. Grant.
The Hon'ble E. C. Morgan.

The Hon'ble MR. STOKES moved that the Reports of the Select Committee on the Bill to provide for the holding of property by certain Religious Congregations be taken into consideration. He reminded the Council that this Bill had originated in the complaint made, as far back as 1873, by certain members of the Simla Union Church, that they laboured under a hardship in being unable, without constantly recurring trouble and expense, to keep up a permanent and effective body of trustees to whom to commit the property of the church. The Secretary to the Calcutta Missionary Conference, about the same time, made a similar representation; and there were, as afterwards appeared, other bodies associated for religious purposes in India who experienced like difficulties.

A Bill was accordingly framed on the model of the Statute known as Peto's Act, 12 & 13 Vic., c. 28. It merely provided that when property of certain descriptions was conveyed on trust for any religious congregation, and no special provision was made for the appointment of new trustees, new trustees might be appointed in such manner as the congregation might determine; and that, on the appointment of new trustees, whether in exercise of the powers thus conferred or otherwise, the property should vest in them without any further conveyance. Persons professing Hinduism, Muhammadanism, or Buddhism, were excepted from the provisions of the Bill, as it was thought undesirable to interfere with the laws regulating their endowments.

Since the publication of the Bill several communications had been received from the Local Governments, and many of the religious bodies to which the Bill applied, all of which had been carefully considered by the Select Committee to which the Bill had been referred. The Committee had got rid of the ambiguous term "congregation." They had rendered the Bill applicable to immoveable property held for whatever purpose, as well as to moveable property. They had provided for deciding cases of dispute as to what constituted membership of the bodies to which the Bill applied, and for the dissolution of those bodies, and the distribution of their property on being dissolved. These amendments had been mentioned to the Council when the preliminary Report was presented last September, and the present Report stated two further amendments—that words had been inserted in section 3, requiring the memorandum of appointment of trustees to be registered, and that a section had been added declaring that, where there was an instrument containing provisions for the dissolution of a religious body or the distribution of its property on such dissolution, those provisions should not be over-ridden by the Bill.

With these remarks he might ask His Excellency the President to put the motion; but, first, he thought it necessary to notice a criticism received from the Local Government, which styled itself, somewhat inaccurately, "His Grace the Governor in Council." He would quote the criticism verbatim:—

"2. His Grace the Governor in Council much doubts the expediency of creating these perpetual trusts. He observes that they must be for 'a religious purpose,' but what is 'a religious purpose'? Would Mormonism be included? Further, he fails to see with what reason Native Christians are to be shut out. Referring to the last sentence of clause 1, it appears that, in 'Hindus,' converts to Christianity from a particular religion, followed by the majority of the people of India, would be included."

MR. STOKES ventured to say that he had seldom, if ever, read any statement regarding a short and simple Bill, which betrayed so many misconceptions. First, His Grace "much doubts the expediency of creating these perpetual trusts." But the Bill did not create any trust whatever, either perpetual or temporary. It assumed that a trust had been created, and made provision, in certain cases, for the appointment of new trustees and the vesting of the trust-property. Secondly, His Grace observed that these imaginary trusts must be "for a religious purpose." But the words quoted did not appear in the Bill in any one of its stages. The question "what is a religious purpose?" did not therefore arise. The question whether the Bill would apply to

Mormon societies might, MR. STOKES thought, be left unanswered as not very likely to arise in India. When, if ever, it did so arise, our Courts would probably look at the case of *Hyde* v. *Hyde*, L. R. 1 P. & D. 130, as to the non-recognition of a Mormon marriage.

Again, His Grace the Governor in Council failed to see with what reason Native Christians were shut out. The answer was that they were not shut out. If Hon'ble Members would look at section 1, they would see that the Bill applied to every person in British India except "Hindus, Muhammadans, or Buddhists," and persons whom the Governor-General in Council might exclude from the operation of the proposed Act. His Grace obviously supposed that "Hindu" was necessarily an ethnic term, and consequently included Native Christians. But from his connection with "Muhammadans" and "Buddhists," it was clear that the expression "Hindus" was here in the Bill (as it was in the Succession Act, section 331) used strictly as a theological term, and that the exception could not, therefore, apply to converts from Hinduism to Christianity.

MR. STOKES had only further to observe that the Bill would supply an admitted want, and that it had been received with considerable favour by the representatives of many different denominations of Christians in the country,—the Protestant Bishops of Lahore and Rangoon, the learned and excellent Bishop Caldwell, the Roman Catholic Bishop of Bombay, and others,—whose remarks Hon'ble Members would find in the papers laid before them.

The Hon'ble MR. HOPE said there was one question regarding which he should be glad to receive an explanation, which he had no doubt the Hon'ble Mover of the Bill would be able satisfactorily to give, but on which he did not find an answer appearing clearly on the face of the Bill, although it might be latent under certain provisions which he had not fully grasped. A large number of those whose opinion was asked in regard to the Bill had urged the necessity of providing some sort of definition of what a "member" of a religious body was. This matter had been noticed by the Calcutta Missionary Conference, the Judicial Commissioner of the Central Provinces, the Madras Government, the Chief Commissioner of Mysore, the Wesleyan Mission in Mysore, the Legal Remembrancers for Bengal and Bombay, the Archdeacon of Calcutta, the Bishops of Calcutta and Rangoon, and the Judicial Commissioner of Oudh. Some of these authorities had suggested a solution of one kind; others of another; and there could be no doubt that the drawing up of a precise definition of what should constitute church-membership was a matter of extreme delicacy, difficulty, and doubt. It was provided in section 9 that when any question arose, either in connection with the matters thereinbefore referred to or otherwise, as to whether any person was a member of any such body as aforesaid, any person interested in such question might apply by petition to the High Court for its opinion on such question, and that opinion would have the force of a decree. MR. HOPE would be glad to know whether, if there was a provision in the trust-deed stating what membership should mean, that provision would stand absolutely good in all voting in respect of the matters provided for in sections 2, 6, and 7 of the Bill. He was inclined to think it would.

The Hon'ble MR. STOKES replied that he thought it would; and he was sorry he had not brought with him a case (*Forbes* v. *Eden*, L. R. 1 Scotch Appeals 580) which he was looking at only half-an-hour previously in the Legislative Council House, and in which Lord Cranworth laid down that the Court was bound to take cognizance of the provisions of any instrument upon which a voluntary religious association was organised, for the purpose of satisfying itself as to who was entitled, as a member, to the funds.

The Hon'ble MR. HOPE said he was quite satisfied on that point. He would wish further to know the meaning of the words "or otherwise" in section 9 which he had before quoted. Did they mean *any* question in connection with disputes in the body?

The Hon'ble MR. STOKES explained that the words "or otherwise" referred to things *ejusdem generis* with any of those previously mentioned, such as the appointment of a new trustee, the dissolution of the association, and the like. It would not authorize the Court to decide questions as to the exact nature of the religious teaching to be afforded by the body.

The Hon'ble MR. HOPE expressed himself satisfied upon this point also. He was much obliged for the explanations, which he had thought it best to elicit, in view of the importance of the two points in question.

The Motion was put and agreed to.

The Hon'ble MR. STOKES also moved that the Bill as amended be passed.

The Motion was put and agreed to.

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TABLE OF CASES.

Fully reported in this number.

CALCUTTA HIGH COURT.

THE LEGAL COMPANION.

EDITORIAL NOTES AND SCRAPS.

THE Report of the Indian Law Commission, 1879, having been just published by Government, we reprint elsewhere a portion of it. The following is a summary of the conclusions arrived at by them :—

In conclusion, we have to recapitulate briefly the specific recommendations which we have made in this report :—

(*a*) that the process of codifying well marked divisions of our substantive law should continue;

(*b*) that the eventual combination of those divisions as parts of a single and general code should be borne in mind;

(*c*) that the English law should be made the basis in a great measure of our future codes, but that its materials should be recast rather than adopted without modification;

(*d*) that in recasting those materials, due regard should be had to native habits and modes of thought; that the form which those materials should assume should, as far as possible, resemble that of rules already accepted; that, in other words, the propositions of our codes should be broad, simple, and readily intelligible;

(*e*) that uniformity in legislation should be aimed at, but that special and local customs should be treated considerately;

(*f*) that the existing law of persons should not at present be expanded by way of codification, save that the operation of the European British Minors Act, XIII. of 1874, should be extended;

(*g*) that the laws relating respectively to negotiable instruments, to the subjects dealt with by the Transfer of Property Bill, to trusts, to alluvion, to easements, and master and servant, should be codified, and the Bills already prepared on these subjects be passed into law, subject to the amendments above suggested;

(*h*) that the Law of Wrongs should then be codified;

(*i*) that, concurrently with or after the framing of a Law of Wrongs, the laws relating to insurance, carriers, and lien should be codified;

(*j*) that the legislature should then deal with the Law of Property in its whole extent;

(*k*) that preparation be made for a systematic chapter on interpretation;

(*l*) that the project of framing a digest of the decisions of Indian Courts should be abandoned.

THE following circular order, issued by authority of the High Court of Judicature at Fort William in Bengal, deals with some of the provisions of the Stamp Act, 1879:—

CIVIL.

No. 32, dated the 1st September, 1879.

The attention of all civil judicial officers is called to the changes in the law on the subject of the admission in evidence of unstamped or insufficiently stamped documents effected by the Indian Stamp Act, 1879.

2. By section 20, Act XVIII., 1869, Civil Courts were required to satisfy themselves that the omission to execute a document tendered in evidence, and found not to bear a proper stamp, had not arisen from an intention to evade payment of the proper duty, and, on being so satisfied, they were empowered to receive the amount of stamp-duty deficient, together with a penalty varying from five to twenty times the deficiency, and thereon to certify on the instrument that the proper stamp-duty had been levied thereon. An instrument so certified became admissible in evidence as if originally executed on paper bearing the proper stamp.

3. By section 21, Civil Courts were required to register payments of stamp-duty and penalties, and endorse the amount on the instruments admitted under section 20, and, at the close of each month, to make a return to the Collector of all such receipts, and pay the same to him.

4. By the Act of 1879, Courts are no longer required to enquire into the circumstances under which an unstamped or insufficiently stamped document came to be executed on paper not bearing a proper stamp. By section 33, all public officers, with certain exceptions, are required to examine every instrument chargeable with duty which comes before them in the performance of their official functions, and *to impound* any instrument which appears not to be duly stamped. Every Court impounding an instrument must forthwith note it as "impounded;" such note shall be dated and signed with the ordinary full signature of the impounding officer.

5. Under section 34, such instrument may be admitted in evidence in a Civil Court if the party desiring to use it shall pay the amount necessary to make up the proper stamp-duty, together with a penalty of Rs. 5, or when ten times the amount of deficient duty exceeds Rs 5, then with a penalty of ten times such amount.

6. Section 39 requires that Civil Courts shall certify by endorsement on every instrument admitted in evidence under section 34 that the proper duty and penalty have been levied in respect thereof, and the name and residence of the person paying them.

7. Section 35 requires every Civil Court to send to the Collector an authenticated copy of every impounded instrument admitted in evidence. The endorsement required by section 39 should be transcribed on such copy. When an impounded instrument has not been admitted in evidence, whether from failure to pay the requisite duty and penalty, irrelevancy, want of registration, or other cause, it must be sent in original to the Collector. In such cases the provisions of section 43, paragraph 2, are applicable. The copy to be made under this section must be retained in the custody of the Court.

8. Section 39, paragraph 2, entitles persons tendering documents on which deficient stamp-duty and penalty has been levied under section 34 to reclaim the same; but the 3rd paragraph of that section directs that the Court shall not under any circumstances, deliver it before the expiration of one month from the date of impounding it; and if the Collector has certified that its further detention is necessary, it shall not deliver it so long as such certificate is not cancelled. It is obvious that the transmission of the copy to the Collector should be made with the least possible delay, to enable him to make such enquiry as may be necessary within the month for which the instrument is to be detained. The High Court therefore directs that every such copy shall be despatched not later than 48 hours from the time when the original is impounded.

9. Judges of all grades will bear in mind that the provisions of section 34 do not apply to bills of exchange, promissory notes, or any instrument chargeable with a duty of one anna only. The rule on this subject is unaltered; but the provisions of section 28, Act XVIII. of 1869, have been so frequently overlooked, that the Judges take this opportunity of calling attention to it.

10. The authenticated copies required by section 35 and section 43 do not require to be stamped under the Court Fees Act.

11. The monthly return to the Collector of duty and penalties levied in Civil Courts, required by Circular Order No. 16, of 4th December 1876, will be continued till further orders.

THE High Court, N. W. P., has decided, in the case of *Alijan* v. *Raghunath Sing*, that an appeal lies against an *ex-parte* judgment, Pearson and Straight, JJ., observing: "There can be no doubt that, under the new Code of Procedure, the appellant in the lower Appellate Court was competent to appeal against the judgment of the Court of first instance, even though he had not defended the suit in that Court. The terms of section 540 are conclusive in this point, for no special or express provision of the Code deprives a defendant against whom a decree is passed *ex-parte* of the right of appeal." *Gulab Singh* v. *Lachmon Dos*, I. L. R., 1 All. 748, is in point.

SIR RICHARD GARTH, Kt., Chief Justice, Calcutta High Court, in giving his opinion on the Small Cause Court reference in the case of *Ram Persaud Shaw* v. *Chunder Cant Mookerjee* (29th August 1879), made the following remarks on sections 91 and 92 of the Evidence Act:—

Section 91 of the Evidence Act only says, that when the terms of a contract have been reduced into writing, no evidence except the writing itself shall be received in proof of the contract; and section 92 says that no such evidence shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the written document.

But there is no reason why the assent of one or both of the parties to the written document should not be given and proved orally. As for instance, suppose that two persons arrange the terms of a contract verbally, and then reduce those terms into writing; but neither testifies his *consent to them* by his signature. Parole evidence would not be admissible in such a case to prove what the terms of the contract were, nor to contradict or alter the terms of the written instrument; but it might be proved that the parties *verbally assented* to the written terms. Or again, (what very often happens) suppose that one person were to write a letter to another, proposing some arrangement, and that the other were to assent verbally to the proposal, the letter would undoubtedly be the legal evidence of the contract, though the assent of the party who received the letter might be proved by oral evidence.

Or if the terms of the contract had been contained in two letters instead of in one, written at different times; and the receiver of the letter had assented to one letter in writing, and to the other verbally, the whole would constitute a perfectly good contract, and the assent to the last letter must of course be proved by parole evidence. Now here in the first instance the bought and sold notes, when delivered to the parties by the broker, agreed in all particulars, but when the bought note was delivered to the defendants the latter would not consent to it without the insertion of the words "and subject for approval." Until therefore this stipulation had been

assented to by the plaintiff the parties were not agreed, but upon the plaintiff assenting to them, the contract was complete, and not the less so, because the consent of the plaintiff to a part of the writing had been given orally.

THE Government of India has made the following rule under the Stamp Act:—

"No. 996, dated Simla, the 6th June 1879.

NOTIFICATION.—By the Government of India, Financial Department.

In exercise of the powers conferred by section 56 of the Indian Stamp Act, 1879, the Governor-General in Council is pleased to make the following rule:—

When a single sheet of impressed stamp paper used under rule 5 of the rules promulgated by Financial Notification No. 196, dated 19th April 1879, is found insufficient to enable the entire instrument to be written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of such instrument, provided that in every such case the side of the impressed stamp paper which bears the stamp must be covered by a substantial part of the instrument before any part of the latter can be written on the plain paper joined to the impressed stamp paper.

This permission does not extend to hundis."

IN the *Second Appeal*, No. 184 of 1879, of the High Court, N. W. P., it was found that there was a deficiency of stamp duty on the plaint in the suit, in the petition of appeal before the lower Appellate Court, and also in the memorandum of appeal to the High Court. The respondent was the plaintiff in the suit, and also appellant in the lower Appellate Court. The Registrar making a reference to the Court for order, Straight, J., made the following order:—

"The appeal may be admitted, the appellant undertaking to raise before the Division Bench the question whether he is bound to make up the deficiency of stamps not only in the Courts where he was appellant, but also where he was respondent. The question as to the sufficiency of stamp will therefore abide the determination of the Division Bench.

"The deficiency in this Court must be paid by the appellant at once."

On the question whether appellant was bound to make up the deficiency of stamps not only in the Court where he was appellant, but also where he was respondent, the Division Bench, consisting of the Hon'ble the Chief Justice and Mr. Justice Pearson, passed the following order :—

"The respondent here must make good the deficiency in the amount of the fees payable on his memorandum of appeal in the lower Appellate Court and on the plaint filed by him in the Court of first instance."

CIRCULAR ORDERS OF THE CALCUTTA HIGH COURT.

No. 26, DATED 21ST JUNE 1879.

The attention of the Judges having been called to the fact that the Circular Order No. 12, dated 31st March 1879, lays down a rule for the guidance of the subordinate Courts in a matter which may more conveniently be left to be disposed of by a judicial decision, I am directed to say that the said Circular is hereby cancelled, and, in lieu thereof, the Court desires that all District Judges and all Moonsiffs at out-stations will publicly impress upon pleaders of all grades a sense of their responsibility to the Courts in which they practise in the matter of accepting vakalutnamahs from parties themselves, or from persons professing to be authorized by special or general powers of attorney to act on behalf of other persons.

2. The Courts accept vakalutnamahs on the responsibility of pleaders. A pleader accepting a vakalutnamah purporting to be executed by his client in person is bound to satisfy himself that it was so executed. When it purports to be executed by a third party on behalf of his client, he is bound to ascertain that such person has been duly empowered by the client to appoint a vakeel, and has himself executed the vakalutnamah.

3. The Judges and Moonsiffs above mentioned, after reading and explaining this order to the pleaders at their stations, will record a proceeding setting forth that they have done so, to which the pleaders will be requested to attach their signatures.

No. 30, DATED THE 23RD AUGUST 1879.

The following instructions are issued in order to secure uniformity of practice in the matter of levying stamp-duty on applications for copies, and on the copies themselves.

2. Under Article 1 (*a*), Schedule II., Act VII. of 1870, every application for a copy must bear a stamp of one anna.

3. Copies which are not issued with a certificate of their correctness do not require a stamp under the Act. Copies of public documents certified under section 76 of the Evidence Act to be correct must be charged with a court-fee under one of the articles 6, 7, or 9 of Schedule I. of the Court Fees Act. Every copy under article 8 must of necessity be stamped.

4. Unauthenticated copies should only be marked as "examined" and initialed by the examiner, while copies to be used, or capable of being used, as evidence, should be "certified to be a correct copy," and signed in full, and bear the seal of the Court.

CIVIL.

No. 33, dated the 18th September, 1879.

The High Court finds it necessary to call the attention of the Judges of Subordinate Courts to the following observations and rules with reference to sections 294 and 306 of the Code of Civil Procedure.

2. Section 294 does not provide for the set-off of a part of the purchase-money against a part of the amount due under a decree. The whole of the purchase-money may be set off against a part of the amount due under a decree, where the latter exceeds the former; or where the purchase-money exceeds the amount due under the decree, the whole of the latter may be set off against the former.

3. When the decree-holder purchasing property of his debtor at an execution-sale, with leave of the Court, desires to make a set-off, the Court executing the decree "shall enter up satisfaction of the decree, in whole or in part, accordingly." No receipt is required from the decree-holder, and the entering up of satisfaction does not depend upon his giving such receipt. When he has signified his intention of claiming a set-off, the Court is to *enter up satisfaction* in full, or in part, as the case may be, without any further action in that respect by the decree-holder.

4. Satisfaction cannot be entered up until the sale has been confirmed, and must then be done once for all. The practice of entering up satisfaction, as for the earnest-money required under section 306, is irregular, and is prohibited.

RULES FRAMED UNDER SECTION 652 OF THE CIVIL PROCEDURE CODE.

I.—When the amount to be paid by a decree-holder buying with the leave of the Court, and who has signified his intention of claiming a set-off, is not more than the amount due to him under the decree and for the costs of executing it, the deposit required shall not exceed the amount of the court-fees due on the sale under clause *f*, Article 6, Parts II., III., and IV. of the Rules under the Court Fees' Act, section 20, clause *i*.

II.—When the amount of purchase-money exceeds the amount due to the decree-holder as above, but such excess, together with the amount of court-fees due for the sale, does not exceed 25 per cent. of the purchase-money, the deposit required shall not exceed the amount of such excess and court-fees.

III.—When the excess, with or without the court-fees for the sale, is greater than 25 per cent. of the purchase-money, the full deposit of 25 per cent. shall be required as authorized by section 306.

IV.—Whenever the amount due as court-fees for the sale of the property has been deposited under Rule I. or Rule II., the Court shall, at the time of confirming the sale, direct that such sum be applied by an officer of the Court to the purchase of the necessary stamps, and shall cause the same to be attached to the proceeding containing the order of confirmation, and to be then and there properly defaced. All Judges will be held personally responsible for compliance with this order, which, if attended to at the proper time, will give no appreciable trouble.

CALCUTTA HIGH COURT.

THE 26TH FEBRUARY 1879.

(Before Mr. Justice Ainslie and Mr. Justice Broughton.)

THE EMPRESS *v.* KETABDI MUNDUL.*

Culpable Homicide—Rashness, Negligence—Penal Code, ss. 304, 304A, 336, 337, and 338—Enhancement of Sentence.

Section 304A of the Penal Code does not apply to a case in which there has been the voluntary commission of an offence against the person.

If a man intentionally commits such an offence, and subsequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result; and if such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences, Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character.

Vedamurti Nagabhushanam (7 Mad. H. C. R. 119) cited and approved.

This was a reference to the High Court under s. 287 of Act X. of 1872.

It appeared that a female child of eight or nine years of age was the wife of the prisoner. She was brought by her father to the prisoner's house for the purpose of being left there. But, in consequence of her distress, her father remained for the night. At night the child and the accused went inside the house; the fathers of both the child and the accused remaining outside in the verandah. After midnight, the child, leaving the house, apparently with the intention of going home to her father's house, got into a canoe, which sank, and left her in the water, from which she was rescued by the prisoner's father, and brought back to the house by the prisoner. The prisoner, having pulled her into the house, kicked her on the back with his bare foot, from which kick the child fell down and died almost immediately.

From the medical evidence it appeared that the girl was quite healthy, and that she had died from rupture of the anterior coat of

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* *Vide* I. L. R., 4 Calc. 764.

the stomach caused by external violence, which might have resulted from a violent kick with a bare foot; there was also a slight wound on the head, and a bruise on the back of the neck. The prisoner was committed on the charge of culpable homicide. The Sessions Judge was of opinion that the case did not amount to culpable homicide, inasmuch as the prisoner had no intention to cause death, and had not the knowledge that the act was likely to cause death. He, therefore, convicted the prisoner under s. 304A, and sentenced him to one year's rigorous imprisonment, because the prisoner, in carrying out his intention to cause hurt, committed a rash act, which, even if he did not know it to be likely to cause death, was of a nature not altogether unlikely to lead to that result.

On the case coming up before the High Court, a rule was issued calling upon the prisoner to show cause why the conviction should not be modified and the sentence enhanced.

No one appeared either for the prisoner or the Crown.

The opinion of the High Court was given by Ainslie, J. (Broughton, J., concurring):—We do not concur in the view of the law taken by the Sessions Judge. In the case of *Khiran Nomiya*,† this Court, on 3rd September 1877, held that s. 304A does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character.

† Unreported.

There is a judgment of the Madras Court—*Nidnamirti Nagabhushanam*‡—in which Mr. Justice Holloway explains the use of the words "rashness" and "negligence" in the Penal Code, and this judgment has been recently approved by the Chief Court of the Punjab, and reproduced in a circular issued by it to all Civil Courts.

Mr. Justice Holloway says:—"Culpable rashness is acting with consciousness that mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening.

"The imputability arises from acting despite of the consciousness.

"Culpable negligence is acting without the consciousness that illegal or mischievous effects will follow, but in circumstances which show that the actor has not exercised the caution incumbent on him, and that, if he had, he would have had the consciousness.

"The imputability arises from the neglect of the civil duty of circumspection.

"It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts themselves intended, which are the producers of death."

We, therefore, set aside the conviction under s. 304A. The facts set out above appear to us to require that the accused should be convicted under s. 304.

In judging of knowledge had by the accused, we must consider the circumstances: the blow that to one person, or under ordinary circumstances, may not, in the ordinary course of nature, be likely to cause death, may yet be imminently dangerous to another, or under special circumstances.

To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death. We, therefore, convict the prisoner Ketabdi under the latter part of s. 304, Indian Penal Code, and sentence him to five years' rigorous imprisonment, to run from the date of his original sentence.

Conviction modified and sentence enhanced.

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‡ 7 Mad. H. C. R. 119.

CALCUTTA HIGH COURT.

THE 29TH AUGUST 1879.

(Before the Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Pontifex.)

CHUNDER COOMAR ROY and another (Defendants), *Appellants*,

vs.

GOCOOL CHUNDER BHUTTACHARJEE (Plaintiff), *Respondent.*

Code of Civil Procedure, ss. 26, 27, and 32—Act XXVII. of 1860, s. 2—Certificate.

S. 32, Civil Procedure Code. appears to apply to those cases only where the plaintiff, who has brought the suit, is one of the right parties to sue; but some other person, either as being his co-contractor, or otherwise jointly interested with himself, ought to have been joined as a co-plaintiff. It does not appear to be intended to enable a plaintiff, who has brought a suit without having any right to do so, to add the name of a person who has the right to sue, and to obtain a decree in right of that person.

The intention of Act XXVII. of 1860 appears to be that, as a *general rule*, no Court shall compel any debtor of a deceased Hindu or Mahomedan to pay his debts to any person unless such person shall either have obtained a certificate under the Act, or probate of the deceased's will, or administration to his effects. The only exceptions to this rule are cases where not only there is no reasonable doubt as to the person entitled to receive the money, but where also the debtor withholds the debt from fraudulent or vexatious motives. The mere non-payment of the debt when it has never been asked for, or where the debtor is doing his best to pay it, is clearly not a *withholding it from fraudulent or vexatious motives.*

Mr. Phillips and Mr. J. G. Apcar, instructed by Messrs. Beeby and Rutter, appeared for the appellants.

Mr. Bonnerjee and Mr. Mitter, instructed by Babu Brojonath Mitter, appeared for the respondent.

This was a suit brought by the plaintiff Gocool Chunder Bhuttacharjee, as the only son and heir of his father Shibchunder Bhuttacharjee, to recover from the defendants the sum of Rs. 6,736 for principal and balance of interest due on a joint and several promissory note executed by the defendants in Calcutta on the 6th June 1875. The plaintiff prayed for such further interest as the Court would allow.

When the case came on for final disposal before Mr. Justice Wilson, it appeared that Sreemutty Kisto Kaminee Dabee, the widow of Shib Chunder Bhuttacharjee, deceased, had obtained letters of adminis-

tration to the estate and effects of her late husband, and upon the application of counsel for the plaintiff it was ordered that her name as such administratrix be added as a co-plaintiff in the suit. A decree was then given by the Court to the plaintiffs for the full amount of their claim with interest at the rate of six per cent. from the 1st May 1879 until realization, and costs on scale No. 2.

From this decision the defendants appealed.

The following are the judgments:—

Pontifex, J.—The plaintiff in this case sued, as only son and heir of his father, to recover the principal and interest, moneys secured by a promissory note granted by the defendants to the plaintiff's father. The plaint was filed on the 5th of June 1878 within twelve days after the death of the father; but the summons was not served on the defendants until the 18th of June.

In the meantime, on the 8th of June, an order for a grant of letters of administration to the father's estate was made in favour of his widow. This order could only have been made with the concurrence of the plaintiff, who must have been aware before filing his plaint that it would be applied for.

The defendants in their written statement took the objection that letters of administration had been granted to the widow, which precluded the plaintiff from recovering in this suit.

The plaintiff, however, elected to go to trial, and filed interrogatories, which the defendants were obliged to answer. But at the hearing, the plaintiff's counsel asked the learned Judge in the Court below to add the administratrix as a co-plaintiff, which application, though opposed, was granted, as if authorized by section 32 of the Code, and thereupon a decree was at once made for payment to the plaintiff and co-plaintiff not only of the moneys secured by the promissory note, but also of all the costs of suit.

Against that decree the defendants have appealed, insisting that the learned Judge in the Court below had no authority to add the administratrix as co-plaintiff to the hearing, and at all events ought not to have directed the defendants to pay the costs of the suit; for if the addition of the co-plaintiff was necessary, then no costs should have been given up to the hearing; and if her presence was unnecessary, then at least the defendants ought not to have been directed to pay

her costs, or the costs incidental to making her a party. Technically, I am of opinion that the Court below did not have power to add at the hearing the administratrix as a co-plaintiff; and, of course, if the judgment of the Court below is technically wrong, the whole case of costs is open in appeal.

In my opinion, section 32 of Act X. applies to a suit which is to some extent properly instituted, though partially defective; in other words, there is no jurisdiction at the hearing to add a plaintiff unless the original plaintiff had some title to sue.

It was strongly urged before us that the original plaintiff, as sole heir of his father, was entitled to sue alone for the debt, or at least had some title to sue. But section 2 of Act XXVII. of 1860 enacts that "no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate, to be obtained in manner hereinafer mentioned, or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

In this case the plaintiff has not attempted to prove, nor is there any ground for saying, that the defendants withheld payment from fraudulent or vexatious motives. No demand was proved to have been made before suit, and before service of the summons an order for administration had been granted with the plaintiff's concurrence to another person. No offer of obtaining the concurrence of the administratrix was made before the hearing, and it appears that, so far from evading payment, the defendants were taking steps to raise the money.

Section 27 of Act X. authorizes the Court to substitute or add the proper plaintiff when the suit has been instituted by a wrong person under a *bonâ fide* mistake; but, even if there were a *bonâ fide* mistake in this case, it appears to me that as the section does not contain the words "on or before the first hearing," which appear in section 32, the power given by the section ought to be exercised before the first hearing. And as the objection was taken by the written statement, it was mere perversity in the original plaintiff to wait until the hearing before he asked for the administratrix to be made a co-plaintiff.

The order of the Court below being in my opinion technically wrong, the appellants would be entitled to have the decree reversed with costs in both Courts. But inasmuch as substantial justice was in fact done by the decree in ordering payment to the administratrix, I also should be willing, if the parties consent, and for the purpose of saving expense, to allow the decree to stand so far as it directs payment to the administratrix.* But whether the parties consent or not, I think the plaintiffs must pay the whole costs of suit and appeal, to be set off against the decree, if the parties elect to let the decree with the proposed modification stand.

Garth, C.J.—I think that the Court below had no power under the circumstances to add the name of the administratrix as a co-plaintiff, or to give a decree in favour of both plaintiffs.

The amendment was made at the trial under section 32 of the Civil Procedure Code, which allows the Court "to order that the name of any person, who *ought to have been joined* in the suit either as plaintiff or defendant, or *whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the suit,* should be added."

That section, so far as the addition of plaintiffs is concerned, appears to me to apply to those cases only where the plaintiff, who has brought the suit, is one of the right parties to sue; but some other person, either as being his co-contractor, or otherwise jointly interested with himself, ought to have been joined as a co-plaintiff. I do not think that the section is intended to enable a plaintiff, who has brought a suit without having any right to do so, to add the name of a person who has the right to sue, and to obtain a decree in right of that person; and I rather think that the learned Judge in the Court below was of that opinion, because he goes into the question of whether the original plaintiff in this case had a right to sue, and decides that he had, because the defendants were vexatiously withholding the debt from plaintiff; and so the case came within the exception in section 2, Act XXVII. of 1860.

Now it appears to me that in this case there is no ground whatever for saying that the defendants "*vexatiously withheld*" the debt from the plaintiff. The plaintiff, of course, could have no claim whatever for the money till the death of his father Shib Chunder on the

24th of May 1878. Within 12 days of that time—namely, on the 3rd of June 1878—the plaintiff brings this suit. It does not appear that Shib Chunder ever required payment of the debt in his life-time, nor that the plaintiff ever asked for it before he brought this suit. There certainly was no refusal on the defendant's part to pay it; and so far from the debt being *withheld vexatiously* or *fraudulently*, it appears from the answers to the interrogatories which have been put in by plaintiff himself, that the defendants had been trying to make an arrangement to pay whatever was due from them to the plaintiff, as well as to other creditors.

The real reason why the suit was brought so soon after Shib Chunder's death was very candidly admitted by the plaintiff's counsel to have been because the promissory note bore date the *6th of June* 1875, and the plaintiff's advisers filed their plaint on the *5th June 1878 to prevent the claim being barred by limitation.*

But, then, Mr. Bonnerjee, for the plaintiff, contends that where there is no real doubt as to the person entitled to receive a debt, the payment of it must be considered to be withheld "*vexatiously*" if the debtor simply omits to pay it.

But this, in my opinion, is not the meaning of the section. If it were, I think the object of the Act to me would be entirely defeated. The heir of a deceased Hindu or Mahomedan might then always sue for a debt due to his ancestor without even asking for it; and unless the defendant could show at the trial that he had any reasonable doubt as to the party entitled to receive the money, the plaintiff would be entitled to recover. This would not be affording to the debtor the protection which the Act intended to give him; and it would be giving no meaning except perhaps a very strained and unnatural one to the words "*withheld from fraudulent or vexatious motives.*"

I consider the intention of the Act to be that, as a *general rule*, no Court shall compel any debtor of a deceased Hindu or Mahomedan to pay his debts to any person unless such person shall either have obtained a certificate under the Act, or probate of the deceased's will, or administration to his effects. The only exceptions to this rule are cases where not only there is no reasonable doubt as to the person entitled to receive the money, but where also the debtor withholds the debt from fraudulent or vexatious motives. The mere non-payment of

the debt when it has never been aksed for, or where the debtor is doing his best to pay it, is, to my mind, clearly not a *withholding it from fraudulent or vexatious motives.*

I am strongly disposed to agree with what fell from my learned colleague during the argument, that if the heir of a deceased Hindu sues for a debt without having obtained a certificate, or probate, or administration, upon the ground that his case comes within the exception in section 2, he would state facts in his plaint to show that his case is within the exception ; that is to say, that there is no reasonable doubt that he is the person entitled to receive the debt, and that the defendant is withholding it from fraudulent or vexatious motives. If he does not make this statement, it ought to be good answer on the part of the defendant that the plaintiff has not obtained a certificate, or probate, or letters of administration, and consequently that he has no right to sue.

The Madras High Court has held in *Govindappah* vs. *Kondappa Sastrudu*, 6, Madras High Court Report, 131, that it is sufficient for the plaintiff to be prepared at the trial with proof of his certificate, when he has stated in his plaint that he has applied for it, and possibly it might be right (in analogy to cases in England where the party sues an executor or administrator, and obtains his probate or letters of administration before the trial) to hold that this would be sufficient.

But that is not the plaintiff's case here. He had neither obtained nor intended to obtain administration, and the defendants raised the point by a direct plea that administration has not been granted to the plaintiff, but had been granted with the plaintiff's consent to a third person.

The plaintiff therefore having no right whatever to sue, and the Court having now power to compel the defendants to pay him the money, he applies at the trial to add the name of the administratrix as a co-plaintiff with himself.

He does not apply to *substitute her name for* his: that he must have done under section 27 of the Code, and the Court could not have granted the application, unless it had been satisfied that the plaintiff had sued in his own name *under some bonâ-fide mistake.* Here it is not pretended that there was any mistake.

Nor was the application made upon the ground that the plaintiff and the administratrix claimed the right to this debt *in the alternative.*

(See section 26.) Mr. Bonnerjee does not attempt to put his case upon that ground. He contends that the plaintiff and the administratrix had a *joint interest* in the debt; the one as the person beneficially entitled, the other as the person who had the legal right to sue.

But even assuming that in some cases it might be proper that a trustee and his cestui-que-trust should join as co-plaintiffs, that could only be in a case where the Court was at liberty, if it thought proper, to make a decree in favour of the cestui-que-trust. But here the Court is expressly prohibited by section 2 of the Act of 1860 from ordering the defendants to pay the debt claimed to the plaintiff, and it is equally prohibited, as it seems to me, from ordering the defendants to pay the debt to the plaintiff *conjointly with some one else*, who has a better title. If this were permitted, creditors would be deprived of the very protection which Act XXVII. of 1860 was intended to afford them. A party claiming as heir to a Hindu, but having no title as such, might always sue with impunity for a debt due to the estate, and then, by bringing into the suit at the last moment the party who is really entitled, they might obtain a joint decree.

In this case, the party who had no right to sue brought the suit. The party who had the right did not sue, and yet, by making these two persons co-plaintiffs at the trial, the Judge not only places them in a position to obtain a joint decree, but obliges the defendants, who had at any rate an answer to the suit up to the time when the administratrix was joined, to pay the costs of it *ab initio*.

The plaintiff had really no excuse here for the course which he adopted. He might, if he pleased, have taken out administration himself, or, when he waived his right in favour of his mother, he might have withdrawn his suit at little or no expense within three days after he had filed his plaint, and allowed another suit to be brought at once in the name of the administratrix. There was no difficulty as regards limitation, because interest had been paid up to March 1878; and the plaintiff had full notice of the mistake he was making, because the point was directly raised in the defendant's written statement.

* * * * * * *

In order to avoid further delay and expense, I am prepared, if both parties will assent to that course within a fortnight from this date, to allow the decree of the Lower Court to stand in favour of the administratrix only, Mr. Bonnerjee's clients paying the costs in both

courts on scale 2. In that case the name of the original plaintiff will be omitted, and the amount of the defendants' taxed costs will be deducted from the amount of the decree.

If the parties do not consent to these terms within a fortnight from this date, the judgment of the Court below will be reversed, and the plaintiff's suit will be dismissed with costs in both Courts on scale 2.

PRINCIPLES OF THE INDIAN PENAL CODE.

[*As laid down by the original framers before the Governor-General of India in Council in the year 1837.*]

NOTE M.

ON OFFENCES AGAINST THE BODY.

The first class of offences against the body consists of those offences which affect human life; and highest in this first class stand those offences which fall under the definition of voluntary culpable homicide

This important part of the law appears to us to require fuller explanation than almost any other.

The first point to which we wish to call the attention of his Lordship in Council is the expression "omits what he is legally bound to do," in the definition of voluntary culpable homicide. These words, or other words tantamount in effect, frequently recur in the Code. We think this the most convenient place for explaining the reason which has led us so often to employ them. For if that reason shall appear to be sufficient in cases in which human life is concerned, it will *a fortiori* be sufficient in other cases.

Early in the progress of the Code it became necessary for us to consider the following question: When acts are made punishable on the ground that those acts produce, or are intended to produce, or are known to be likely to produce certain evil effects, to what extent ought omissions which produce, which are intended to produce, or which are known to be likely to produce the same evil effects to be made punishable?

Two things we take to be evident; first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omissions ought not to be punished. It will hardly be disputed that a gaoler who voluntarily

causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant entrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die. It is difficult to say whether a Penal Code which should put no omissions on the same footing with acts, or a Penal Code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

It is plain, therefore, that a middle course must be taken. But it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn, it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include.

Mr. Livingston's Code provides that a person shall be considered as guilty of homicide who omits to save life, which he could save "without personal danger or pecuniary loss." This rule appears to us to be open to serious objection. There may be extreme inconvenience without the smallest personal danger, or the smallest risk of pecuniary loss, as in the case which we lately put of a surgeon summoned from Calcutta to Meerut to perform an operation. He may be offered such a fee that he would be a gainer by going. He may have no ground to apprehend that he should run any greater personal risk by journeying to the Upper Provinces than by continuing to reside in Bengal. But he is about to proceed to Europe immediately, or he expects some members of his family by the next ship, and wishes to be at the presi-

dency to receive them. He, therefore, refuses to go. Surely, he ought not, for so refusing, to be treated as a murderer. It would be somewhat inconsistent to punish one man for not staying three months in India to save the life of another, and to leave wholly unpunished a man who, enjoying ample wealth, should refuse to disburse an anna to save the life of another. Again, it appears to us that it may be fit to punish a person as a murderer for causing death by omitting an act which cannot be performed without personal danger or pecuniary loss. A parent may be unable to procure food for an infant without money. Yet the parent, if he has the means, is bound to furnish the infant with food, and if by omitting to do so he voluntarily causes its death he may with propriety be treated as a murderer. A nurse hired to attend a person suffering from an infectious disease cannot perform her duty without running some risk of infection. Yet if she deserts the sick person, and thus voluntarily causes his death, we should be disposed to treat her as a murderer.

We pronounce with confidence, therefore, that the line ought not to be drawn where Mr. Livingston has drawn it. But it is with great diffidence that we bring forward our own proposition. It is open to objections: cases may be put in which it will operate too severely, and cases in which it will operate too leniently: but we are unable to devise a better.

What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner; provided that such omissions were, on other grounds, illegal. An omission is illegal (see clause 28) if it be an offence, if it be a breach of some direction of law, or if it be a such a wrong as would be a good ground for a civil action.

We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z food, and by that omission voluntarily cause Z's death. Is this murder? Under our rule it is murder if A was Z's gaoler, directed by the law to furnish Z with food. It is murder if Z was the infant child of A, and had therefore a legal right to sustenance, which right a Civil Court would enforce against A. It is murder if Z was a bedridden invalid, and A

a nurse hired to feed Z. It is murder if A was detaining Z in unlawful confinement, and had thus contracted (see clause 338) a legal obligation to furnish Z, during the continuance of the confinement, with necessaries. It is not murder if Z is a beggar who has no other claim on A than that of humanity.

A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (clause 273). But if A be a mere passer by it is not murder.

We are sensible that in some of the cases which we have put our rule may appear too lenient. But we do not think that it can be made more severe, without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man,—a worse man, probably than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard earned rice? Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose A to be fully convinced that nothing can save Z's life, unless Z leave Bengal, and reside a year at the Cape, is A, however wealthy he may be, to be punished as a murderer because he will not, at his own expense, send Z to the Cape? Surely not. Yet it will be difficult to say on what principle we can punish A for not spending an anna to save Z's life, and leave him unpunished for not spending a thousand rupees to save Z's life. The distinction between a legal and an illegal omission is per-

fectly plain and intelligible. But the distinction between a large and a small sum of money is very far from being so; not to say that a sum which is small to one man is large to another.

The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveller against a swollen river? Is he to be a murderer if he does not go a hundred yards?—if he does not go a mile?—if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction betwen the guide who is bound to conduct the traveller as safely as he can, and a mere stranger, is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life, and a stranger who will not run a mile to save a man's life, is very far from being equally clear.

It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation. Now, no circumstance appears to us so well fitted to be the mark as the circumstance which we have selected. It will generally be found in the most atrocious cases of omission: it will scarcely ever be found in a venial case of omission: and it is more clear and certain than any other mark that has occurred to us. That there are objections to the line which we propose to draw, we have admitted. But there are objections to every line which can be drawn, and some line must be drawn.

ON THE REPORT OF THE INDIAN LAW COMMISSION, 1879.

IT is one of Mr. Herbert Spencer's biological hyhotheses that where the parents of an animal differ widely in a certain quality, the offspring does not, in respect of that quality, form a mean between the two, and is not a homogeneous product. It takes mainly after the one parent or the other, and is not a happy compromise between the two. Without going the whole length with Mr. Spencer, we may safely observe that, if two or more human beings combine for the purpose of turning out some intellectual product, the result of their labours will not bear the joint impress of all the minds concerned, but will reflect only one of them, the others being discernible, if at all, only in vague and shadowy outline. By no possible means can two distinct individuals be amalgamated into one. If there were degrees of impossibility, we should be inclined to say that intellectual amalgamation is even more impossible than physical. When, in February last year, it was determined to appoint Mr. Whitley Stokes, Sir Charles Turner, and Mr. West, members of a Law Commission to report on certain Bills which had been introduced into the Supreme Council, it was pretty well foreseen that though the bills might, in the hands of the Commissioners, be materially altered, yet their eventual passing was only a question of time. The Commissioners have now submitted their Report. It is a lengthy document, occupying 113 pages of the *Gazette of India*. The prefatory essay itself occupies 53 pages. It would be impossible to notice in detail the observations made on each particular Bill, but we feel it necessary to say a few words on the introductory portion of the Report. It is in respect of this portion that we were reminded of Mr. Spencer's hypothesis. An essay can be written only by one person. Suggestions from others may be availed of, but the style is the writer's. And even so far as the views are concerned, they too must be the writer's more than of any body else. We have read the discourse with great care and attention, and we must confess it has struck us only as a sort of altered and enlarged edition of the memorable speech on codification which Mr. Stokes made shortly after his accession to his new office. We cannot say that the edition is altogether an improved one. The discourse now before us is a great deal more prolix, more obscurely worded and unbusiness-like than Mr.

Stokes's speech. But it is easy to see that, as regards this portion of the work, it is, in the nature of things, impossible that the three Commissioners should be able to show their combined power to the best advantage.

The Commissioners begin very properly by considering the different senses in which the word "code" is used. A code means "an orderly and systematic arrangement of the rules relating to some well-marked department of the field of jural rights and duties." It also means "a general assemblage of all the laws of a community." We are told that "codification in the less ambitious sense may properly proceed in meeting exigencies which daily experience brings to light along with the materials out of which the appropriate fabric may in each case be formed." Having regard to the course of recent Indian legislation and to the general spirit and tenor of the Commissioners' Report, it strikes as somewhat surprising that in a consideration of the meaning of the term "code" no attempt is made to bring the proposed Indian Acts under the definition of that term. We do not object to codification in either of the senses given above. But we have very serious objections to the enactment of perfectly new laws. The orderly *arrangement* of existing rules is desirable on every ground, but the wholesale *creation* of rules is a proceeding which can only be allowed in times of grave emergency and upon the clearest proof of necessity. It is scarcely logical to define "code" and justify codification in certain senses, and then to construct bodies of law which are entirely outside the definition, and to which the general justification of "codes" is utterly irrelevant. We believe there is some little confusion of thought in another sentence which occurs in the first paragraph of the Report: "When the effects of the special laws have been ascertained by their persistence under varying circumstances, the causes will become apparent by comparison." It is difficult to make out from this whether the problem is to discover causes or effects. It seems as if the inquiry is to discover both. If so, the inquiry is an altogether absurd one, and ought to be renounced at once. It is no more possible to solve a problem where both the causes and effects are unascertained than to solve a single equation with two unknown qualities. Of given phenomena the causes may be sought for. But it is absurd to search, at the same time, for the causes of unascertained facts and the effects of unascertained causes.

The Commissioners go on to observe: "It has been objected that this plan of ultimate scientific arrangement seems to mix up two radically different ways of looking at law—namely, that which may be called the historical .... and the abstract, or as it has been called the anti-historical." They do not recognize the validity of the objection, and do not confess that it is impossible, in constructing a code, to give full play to the two methods, but they simply pour contempt on the argument. "We have to confess that we are unable to perceive the inconsistency complained of, or to appreciate the force of the argument adduced in support of the recommendation that, while particular sections of a complete and systematic body of civil law are proceeded with, the notion of their eventual combination in due co-ordination as parts of a single and general code ought to be abandoned." "The notion of their eventual combination in due co-ordination," is a phrase the literary beauty of which it is difficult to appreciate. But addressing ourselves more to the matter than to the form, we are bound to say that the confident tone of the Commissioners presents a striking contrast to the humility and moderation with which Sir Fitzjames Stephen, himself a great champion of codification, speaks of the same argument. In a paper entitled, "The Criminal Code of 1879," published in the January number of the *Nineteenth Century*, Sir James Stephen says: "The objections against codification commonly relied upon are these. The laws of all countries, and above most others the laws of England, have a history. They have been enacted by degrees, as circumstances rendered them necessary; and unless you are prepared to revolutionize them altogether, you will never be able to reduce them to an exact symmetrical system. You can no more give to an ancient body of law the symmetrical completeness which might perhaps be attained in legislating for a new country than you can give to an ancient house, built at various periods, in different styles, and with a view to different habits of life, the simplicity and unity of plan which you expect in an entirely new house. It is commonly added that to reduce the whole of the law to a definite written form would, if possible, be undesirable. Such a process, it is said, will deprive the common law of its elasticity. An unwritten law can, it is said, be moulded by the courts so as to suit the wants of different generations and to meet social changes. A written law can be altered only by the legislature .... These are the standing objections to codification. The true answer to them appears to me to supply an answer at the same time

to the criticisms made by the Lord Chief Justice on this particular proposed code. The answer is that each of them ascribes to the advocates of codification pretensions which ought not to be, and which, if they understand the subject, are not advanced by them."

The scheme of codification proposed by the Commissioners is not only of too pretentious a character, but is based upon an altogether wrong conception of the purpose and function of law. "The true purpose of a code is to further the moral and material progress of a people by fostering a general harmony of thought and action, and by employing all the means afforded by existing conditions for ensuring a future amelioration. There must, then, be exact and sympathetic observation leading to true insight; there must be development; there must also be adoption and appropriation; but all without waste of force, and without neglect of any element which by its unacknowledged presence will set all calculations at fault." The true purpose of a code is not to further moral and material progress, but only to reflect such progress. Moral and material progress is not so easily accomplished as the Commissioners imagine. To save European Turkey from insolvency and ruin it has not been thought necessary to send there a number of codifiers. Progress is determined by a variety of causes, of which Positive Law is only one, and a small one. The business of Law is to preserve Order, and not to secure Progress; to maintain and fortify Morality, not to inculcate new systems. The Commissioners make an appropriate extract from Burke, but ignore its spirit. "Government," says Burke, "is a practical thing made for the happiness of mankind, not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians," and the "true end of legislation is to follow, not to force, the public inclination, to give direction, a form, a tecnical dress, and a specific sanction to the general sense of the community." According to the Indian Law Commissioners the end of legislation is not to follow, but to forcibly guide, the public inclination; not to give a techical dress and a specific sanction to the general sense of the community, but to create a new sense. In regard to societies that are capable of progress, it has been observed by no less an authority than Sir Henry Maine that "social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to re-open." Mr. Whitley Stokes himself in his speech on codification said that laws, in order to be beneficial

in a country, must be, as far as possible, the outgrowth of the material wants and the higher ethical ideas of its people. Society must be left to work out its own progress according to its own laws without let or hindrance from without. But as ideas advance, help from without becomes necessary. When moral progress does take place, then Law comes in, and then only ought it to come in, to put into shape the advanced ideas, and to give them force and precision. The efficacy of a Law lies in the power with which it adapts itself to altered social circumstances and the readiness with which it recognizes and enforces the best ideas of the people. Quite a different view is held by the Law Commissioners, who "are not without hope that a clearly drawn code of absolute civil duties, well adapted to the character of the people, may, with the Penal Code and the Contract-law, serve in the course of time as the solid core of a greatly improved scheme of popular ethics." With all the deference due to so learned a body, we must record our dissent from a proposition which, we cannot help thinking, reverses the right order of things.

The Commissioners are alive to the fact that law is never dead. "The growth of law is always going on. It is the upshot of a contention ever renewed of rival interests and conflicting tendencies." So, again, in paragraph 27 of the Report, we have the following beautiful epigram: "In the sphere of legislation, as in other spheres, true reformation is a process of evolution rather than of revolution." It would seem from this as if the Commissioners were anxious not to give too great a rigidity to laws. But to our surprise we find that they are so sanguine in their expectations that they do not shrink from contending against nature. They say that "a code had become necessary in order to prevent the endless litigation, the ruinous losses, the manifold embarrassments, and the discouragements to traffic which would attend the slow formation of a complete body of law by the wasteful process of natural selection." Then again: "It is conceivable that here and there its rule [*i. e.* a rule of the code] will constitute a barrier in some direction which otherwise the course of social evolution would have taken." We are not quite sure how the principle of natural selection works among laws, but if it does work at all, it would be far wiser to recognize it and respect it than to throw obstacles in its way. If a seed is sown, the tree will grow according to laws of nature. And if any person, impatient at the slow and wasteful process, injects into it foreign sap, and con-

tinually meddles with it, there is sure to be a disaster in the end. The Report of the Commissioners bears internal evidence of their acquaintance with the writings of Bacon. They would have done well to remember his famous saying that we conquer Nature by submitting to her. They have materially impaired the value of their Report by giving it the air of a polemic. Instead of addressing themselves in a plain and business-like way to the subject in hand, they have made no end of digressions from the straight course. A great many collateral issues are raised, hotly discussed, and left undetermined. Whole heaps of abstract propositions are poured forth in bewildering succession, and scarcely a single concrete instance is given to explain or illustrate any one of them. The language, too, for the most part, is singularly infelicitous. Metaphors drawn from Natural Science and Metaphysics have made confusion worse confounded, and in reading the Report as a matter of duty we are almost bored to death as the ponderous discourse drags its dreary length along. "A sense of the necessity for fixed laws is one of the earliest sentiments of every settled community. It rests on the constraining influence of habit, a centripetal instinct, and the perception of utility according to the dominant notions of the general good." As a historical fact it is not true that in the earlier stages of society laws originate in the "perception of utility according to the dominant notions of the general good." But what is to be understood by the expression "centripetal instinct"? What purpose is served by describing conflicting or inconsistent legal principles as an "antinomy"? The expression is scarcely met with anywhere except in the Philosophy of Kant, and there was no necessity for using it unless it was perhaps to inform people that the Indian codes were to be framed upon a system of Transcendental Ethics, just as Kant had his Transcendental Logic and Transcendental Æsthetic.

To codification properly so called we have no objection. But what is codification? Austin, who was a great advocate of that process, says: "In speaking of the advantages and disadvantages of statute and judiciary law, I advert to the form, and not to the matter. It is clear that these considerations are completely distinct..... Codification does not involve any innovation on the *matter* of the existing law. To imagine the contrary is a mistake often made by the opponents of codification. They often suppose codification to mean an entire change of all the law obtaining in the country." One of the best living

authorities on the subject, Professor Sheldon Amos, describes codification as the "process of republishing in an authoritative and systematized form the whole existing contents of a legal system." He adds that the common notion of codification generally also includes the filling up of accidentally vacant gaps, through fresh legislation suggested by the codifier. It is clear that this is not the sense in which the Law Commissioners understand the term codification. What we are having, and are going to have, is not Legal Reconstruction, but the enactment of perfectly new laws. The law of Private Trusts, the law of Master and Servant, the law of Easements, the law of Wrongs, are all new laws. They all relate to the matter of the law, and not to its form. If the common law of the country in respect of these matters had grown to inconvenient proportions, we should have longed for their conversion and consolidation into statute-law. But the laws that are about to be passed are not made up of indigenous materials at all, but are wholesale importations from foreign countries. Obviously, therefore, all that can be said in defence of codification in the abstract has no bearing upon the peculiar sort of codification that has been commenced in this country. Even as regards codification in the true sense of the word, it can be successful only under two conditions: First, that there are men competent to construct a code; and, secondly, that there are men qualified to understand and apply it. Austin, speaking of the first condition, says: "Whoever has considered the difficulty of making a good statute will not think lightly of the difficulty of making a code.... Statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely, or constructed so unaptly, that decisions interpreting or supplementing their provisions have been of necessity heaped upon them by the Courts of Justice." The Law Commissioners seem to be not altogether forgetful of the qualifications necessary for the task. Speaking of the Personal Law relating to Hindus and Mahomedans, they say: "There must be a competent knowledge of the existing written and unwritten law, intimacy with native habits and modes of thought, a set of associations through which the mind of the inquirer is spontaneously affected with an emotion, or the reflex of an emotion akin to that which will be on any occasion felt by the ordinary Mussulman or Hindu." But where is all this competent knowledge to be found? We have respect for the learning of Mr. Stokes, and have great confidence in the mature

experience and careful judgment of the two English Judges who with him constituted the Indian Law Commission. But to construct a complete series of codes for India is a task from which the stoutest heart might reasonably shrink. When we consider how many able and experienced always are engaged in preparing a draft Code of Criminal Law for England, and for what a length of time they have been engaged, we are greatly struck at the astounding rapidity with which important legislative measures are hurried through the Supreme Council of India. The last observation we shall make is that the benefit of codes will be lost upon the country so long as there are not men qualified to administer them. Mr. Markby in his address at a convocation of the Calcutta University stated the truth very plainly: "The great experiment in legislation now going forward will be a most disastrous failure if the law-education of the country is not kept up to a very high standard. Ideas gathered from Germany, France, Italy, America, and England, are being introduced here with great rapidity." Great as is the necessity of having a well-educated Bar, the necessity of having a well-educated Bench is still greater. The Law Commissioners lay stress on the incompetence of the Mufassal Bar: "The remuneration of professional assistance is, owing to the poverty of the people generally, meagre; and pleaders without private means are unable to provide themselves with text-books or reports, if they are sufficiently educated to study them. The Judges can count on little assistance from the Mufassal Bar in any case that falls outside the range of their daily experience." The thing of primary importance is to have competent Judges. It is rather a delicate matter to speak about, and we can only refer to the recorded opinions of Sir Barnes Peacock and Mr. (now Sir) James Stephen that the Native Judges and Pleaders are generally better instructed in law than Civilian Judges. In a Minute on the Administration of Justice written in the year 1872, Mr. Fitzjames Stephen, after reviewing the opinions of several experienced English officials, came to the conclusion, first, that "the earlier stages of judicial employment do not fit men for appointment as Sessions and Civil Judges;" and, secondly, "that there is some danger that the regular legal education now given to Subordinate Native Judges and Pleaders may cause their efficiency to contrast unfavorably with the inefficiency of European Sessions Judges."

CIRCULAR ORDERS OF THE CALCUTTA HIGH COURT.

(Government Gazette, 16th December 1879.)

No. 27, DATED THE 12TH JULY, 1879.

IT having been represented that the Subordinate Civil Courts, when fixing the periods for the purpose of executing commissions to make local investigations for the purpose of determining the charge to be levied under clause *b*, article 3, Parts II., III., and IV. of the revised rules framed by the High Court under clause 1, section 20 of the Court Fees Act, 1870, do not always make sufficient allowance for the time occupied by the ameen in travelling to the spot, and in preparing his report, the Court are pleased to direct that a charge be made for the time occupied in preparing the report, if it cannot be done at once, but that care be taken that the charge on this account is kept down to what is strictly necessary; and also that, in calculating the fees payable, the actual distance the ameen has to travel be considered, and that it be not assumed, except by the Courts at the sudder station, that he is at the Court issuing the commission, when in fact he is not so. In case it be doubtful where the ameen is, it may be assumed that he is at the sudder station.

No. 28, DATED THE 19TH JULY, 1879.

Whenever, in order to establish the execution or writing of any document tendered as an exhibit in a suit, evidence is given thereof, which, if unrebutted, is legally sufficient for the purpose, the document shall be taken, for the purpose of being endorsed and filed as part of the record, as proved within the meaning of section 142 of the Civil Procedure Code, subject, however, to the provisions of sections 140 and 142 of the Civil Procedure Code.

DIGEST OF RULINGS

ON

THE INDIAN PENAL CODE.

Reported in the 26 volumes of the Weekly Reporter, 15 volumes of the Bengal Law Reports, 12 volumes of the Bombay High Court Reports, 8 volumes of the Madras High Court Reports, 7 volumes of the N. W. P. High Court Reports, 3 volumes of the Indian Law Reports (complete series), &c.

Ss. 2—4.

1. The substantive law applicable to British-born subjects, tried in the High Court of Judicature at Bombay, for destroying a British ship on the high seas at a distance of more than three miles from the shores of British India, is the English law, and not the Penal Code, notwithstanding the provisions of Stat. 30 and 31 Vic., c. 125, s. 11.

The same substantive law is applicable to prisoners who conspire together in Bombay to destroy such ship on the high seas, and such ship is so destroyed in consequence.

The procedure applicable in such cases is the ordinary criminal procedure of the High Court.

The question whether the Indian Legislature has power to legislate with reference to offences committed on the high seas considered; there is not any Act of the Indian Legislature now in force which provides for offences of destroying a ship, when committed at a greater distance than three miles from the coast, or for the abetment in British India of such an offence so committed.—*Reg.* v. *Elmastone Whitewell* et al., 7, Bom. H. C. R., 89.

Ss. 11 and 12, descrip. 10, illus. 1.

2. A Municipal Corporation is not a public servant within the meaning of s. 39, Act IV. 1877, and may, therefore, be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section.—I. L. R., 3, Calc., 758.

S. 21.

3. A person appointed by the Government Solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as Prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21, Penal Code.—*Empress* vs. *Butto Kristo Doss* and another, I. L. R., 3, Calc., 497.

4. An engineer who receives and pays others municipal moneys is a public servant within the meaning of s. 21, cl. 10, Penal Code, although he may not have the power of sanctioning the expenditure of such moneys.—*Reg.* v. *Nantamram*, 6, Bom. H. C. R., 64.

5. The word "officer" in s. 21, cl. 2, Penal Code, means a person employed to exercise to some extent a delegated function of Government; he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. Hence an *izaphatdar*, *i. e.*, a lessee of a village who has undertaken to keep an account of its forest-revenues, and pay a certain portion to the Government, keeping the remainder for himself, is not an officer, and, therefore, not a public servant within the meaning of s. 21.—*Reg.* v. *Ramjirav Jivbajirav*, 12, Bom. H. C. R., 1

S. 29.

6. *See s. 463.*

7. Where a draft-petition was prepared with the intention of being used as evidence of a matter, it was held to fall within s. 29, Penal Code; and as it contained false statements calculated to injure the reputation of a person, the offence was held to fall within s. 469.—10. W. R., Cr., 61.

S. 30.

8. A deed of divorce is a "valuable security" within the meaning of s. 30, Penal Code.—11, W. R., Cr., 15.

9. *Held*, that the copy of a lease is not "a valuable security" within the meaning of s. 30, Penal Code.—*Reg.* v. *Khushal Hiraman* and *Indragir*, 4, Bom. H. C. R., 28.

10. A settlement of accounts in writing, though not signed by any person, is a "valuable security" within the definition of this section.—2, Mad. H. C. R., 247.

11. A document which has not been stamped, and is not therefore receivable in evidence, may nevertheless be a "valuable security".—7, Mad. H. C. R., 26.

S. 59.

(See s. 377.)

12. A was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for seven years, which he commuted, under s. 59, Penal Code, to transportation for the same term

Held that, under ss. 376 and 511, Penal Code, a sentence to imprisonment for the offence committed could not be for a longer term than five years, and such sentence could not be commuted, under s. 59, to transportion for a longer term.—*Queen* v. *Meriam*, 1, B. L. R., A. Cr., 5.

13. An officer who, in the exercise of the powers described in s. 1, Act XV., 1862, has passed a sentence of imprisonment for seven years, has power, under s. 59, Penal Code, to commute that sentence into one of transportation for the like period.—*Queen* v. *Boodhooa*, B. L. R., Sup. Vol. 869.

14. Under section 59, Penal Code, a Court can sentence to transportation only where the offence is punishable with imprisonment for not less than 7 years. It may, in passing sentence, commute the imprisonment to transportation, but cannot do so after the sentence of imprisonment has been passed.—W. R., Sp., Cr., 35 (2, R. J. P. J., 392).

15. To bring s. 59, Penal Code, into operation, the punishment awarded on one offence alone must be 7 years' imprisonment, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation.—2, W. R., Cr., 1; 5, W. R., Cr. R., 44; 8, W. R., Cr., 2.

16. A sentence of transportation under ss. 59 and 412, Penal Code, cannot exceed 10 years.—5, W. R., Cr., 16.

17. Where an offence is punishable either with transportation for life or imprisonment for a term of years, if sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment.—*Queen* v. *Naida*, I. L. R., 1, All., 43.

18. An officer exercising the powers described in s. 1, Act XV., 1862 is competent, under s. 59, Penal Code, to commute a sentence of imprisonment into one of tranportation.—(F. B.) 9, W. R., Cr., 6.

S. 62.

19. A sentence of forfeiture under s. 62, Penal Code, should only be inflicted for offences of the most atrocious kind, or committed under the most aggravated circumstances.—12, W. R., Cr., 17.

S. 65.

20. S. 309, Criminal Procedure Code, does not extend the period of imprisonment which may be awarded by a Magistrate under s. 65, Penal Code; it only regulates the proceedings of Magistrates whose powers are limited. (*Contrast*—Reg. v. *Muhammad Saib*, I. L. R., 1, Mad., 277.)—I. L. R., 1, All., 461.

21. A Subordinate Magistrate of the first class can deal with offences provided for by a special law (in this case Act III. of 1863, B. C.), and sentence to imprisonment in lieu of fine for more than six weeks when the punishment awardable is fine only; s. 67, and not s. 65, Penal Code, being applicable to such a case.—10, W. R., Cr., 30.

22. In a case of assault, a sentence inflicting a fine and awarding imprisonment for one month in default of payment of the fine was held to be illegal with reference to ss. 65 and 352, Penal Code.—16, W. R., Cr., 42.

S. 67.

23. A Subordinate Magistrate of the first class can deal with offences provided for by a special law (in this case Act III. of 1863, B. C.), and sentence to imprisonment in lieu of fine for more than six weeks when the punishment awardable is fine only; s. 67, and not s. 65, Penal Code, being applicable to such a case.—10, W. R., Cr., 30.

S. 70.

24. When a Judge (or other officer) who sentences an offender to fine, and imprisonment in default of the fine, does not also direct levy of the fine by distress and sale if not paid, the successor of the Judge (or officer) may, under s. 61, Act XXV., 1861, levy the fine by distress and sale within the time prescribed in s. 70, Penal Code.—(F. B.) 9, W. R., Cr., 50.

S. 71.

25. S. 71, Penal Code, applies to the case of a person charged with "house-breaking" under s. 457, and "theft" committed on the same occasion under s. 380, Penal Code.—*Reg.* v. *Arjuna*, 1, Bom. H. C. R., 87.

26. Where cumulative sentences under ss. 183 and 353, Penal Code, were held not contrary to s. 71.—14, W. R., Cr., 19.

S. 72.

27. Where a prisoner has made two contradictory statements, and there is no counterbalancing evidence to show which of them is false, he may be convicted upon an alternative finding that he gave false evidence in one or other of the two statements.—4, Mad. H. C. R., 51.

S. 74.

28. Solitary confinement must not be imposed for the whole term of a person's imprisonment. Under s. 74, Penal Code, it is to be imposed at intervals.—*Nyan Suk Mether*, 3, B. L. R., A. Cr., 49.

S. 75.

29. *Held*, that where a person commits an offence punishable under Chapter XII. or XVII. of the Indian Penal Code punishable with three years' imprisonment, and, previously to his being convicted of such offence, commits another such offence punishable under either of such chapters, he is not subject, on being convicted of the second offence, to the enhanced punishment provided in s. 75, Penal Code.—*Empress* vs. *Megha*, I. L. R., 1, All., 637.

30. Penal statutes must be strictly construed; and it would not be right to include Chapter XXIII. of the Penal Code (relating to attempts) within the provision of s. 75 when that section only mentions other chapters of the Code.—21, W. R., Cr., 35.

31. S. 75, Penal Code, only applies to convictions of offences committed after the Code came into operation.—4, W. R., Cr., 9.

32. S. 75, Penal Code, only applies to previous convictions for the same offence or for an offence under the same chapter.—5, W. R., Cr., 66.

33. To warrant a sentence awarding additional punishment under s. 75, Penal Code, as on a second conviction, the evidence that there was a previous conviction against the accused under the Penal Code must be clear and precise.—14, W. R., Cr., 7.

So also as to whipping as an additional punishment.—15, W. R., Cr., 52.

34. A sentence of whipping cannot, with reference to s. 7, Act VI., 1864, be passed on a conviction for theft under s. 379, Penal Code, in addition to transportation for life under s. 75 of the Code, s. 379 only providing for sentences of imprisonment for a term not exceeding 3 years.—21, W. R., Cr., 40.

35. This section gives no authority to a Magistrate to exceed his ordinary jurisdiction.

The only provision which enables a Magistrate to exceed his ordinary jurisdiction is s. 314, Code of Criminal Procedure.—5, Mad. H. C. R., 3.

36. A prisoner convicted under s. 380, Penal Code, of theft in a building used for the custody of property, was sentenced under s. 75 to 14 years' transportation, as he had been previously convicted 13 times

of offences *now* punishable, under Chapter XVII. of the Code, with imprisonment for three years or upwards.

Held, that as all the previous convictions were prior to the passing of the Penal Code, the present offence was not punishable under s. 75.—*Reg.* v. *Kushya bin Yesu*, 4, Bom. H. C. R., 11.

37. Sentence of transportation for 14 years, under s. 392, Penal Code, annulled, as the offence for which such sentence was passed was not committed *subsequently* to any conviction; and s. 75 had, therefore, been improperly applied.

Semble—That a Sessions Judge cannot (under s. 75, Penal Code, or otherwise), by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has last been convicted.—*Reg.* v. *Sakya valad Kavji* et al., 5, Bom. H. C. R., 36.

38. *Held* that, when a person commits an offence punishable under Chapter XII. or Chapter XVII. of the Indian Penal Code punishable with three years' imprisonment, and, previously to his being convicted of such offence, commits another such offence punishable under either of such chapters, he is not subject, on being convicted of the second offence, to the enhanced punishment provided in s. 75, Penal Code.—*Empress* v. *Megha*, I. L. R., 1 All. 637.

S. 78.

39. Officers arresting under civil process judgment-debtors cited as witnesses are not protected under s. 78, Act XLV., 1860.—3, W. R., Cr., 53.

S. 79.

40. Ryots are not protected by s. 79, Penal Code, for resistance to distraint of crops where the zemindar's people enter upon the crops with intention of distraining after notice under s. 116, Act X., 1859.—23, W. R., Cr., 40.

S. 81.

41. *Held*, that a person who placed in his toddy-pots juice of the milk-bush, knowing that, if taken by a human being, it would cause injury, and with the intention of thereby detecting an unknown thief,

who was in the habit of stealing the toddy from such pots, and which toddy was drunk by, and caused injury to, certain soldiers who purchased it from an unknown vendor, was rightly convicted under s. 328, Penal Code, of "causing to be taken an unwholesome thing with intent to injure;" and that s. 81, which says that, "if an act be done without any criminal intention to cause harm, it is not an offence," did not apply to the case.—*Reg.* v. *Dhania Daji*, 5, Bom. H. C. R., 59.

S. 83.

42. In construing s. 83, Penal Code, the capacity of doing that which is wrong is not so much to be measured by years as by the strength of the offender's understanding and judgment. The circumstances of a case may disclose such a degree of notice as to justify the application of the maxim *malitia supplet ætatem.*—1, W. R., Cr., 43.

S. 84.

43. The fact of unsoundness of mind is one which must be clearly and distinctly proved before any jury is justified in returning a verdict under s. 84, Penal Code.—20, W. R., Cr., 70.

S. 95.

44. The pain caused by a blow across the chest with an umbrella was held not to be of such a trivial character as to come within s. 95 Penal Code, but to come under the definition of hurt in s. 319.—24. W. R., Cr., 67.

45. Conviction and sentence by a Magistrate reversed, as the act of which the accused were convicted—taking pods (almost valueless) from a tree standing upon Government waste-ground—came within the meaning of s. 95, Penal Code, and did not, therefore, amount to an offence.—*Reg.* v. *Kasya bin Ravji* et al., 5, Bom. H. C. R., 35.

Ss. 97, 99.

46. A party in possession of land is legally entitled to defend his possession against another party seeking to eject him by force.—*Queen* vs. *Tulsi Singh*, 2, B. L. R., A. Cr., 16.

47. The right of private defence as described in s. 97, Penal Code is subject to the restrictions mentioned in s. 99,—that is, it should be exercised only in the defence of one's own body, or that of another person against an offence affecting the human body. Under s. 102 the right commences only on a reasonable apprehension of danger to

the body caused by an attempt or threat to commit an offence, and by s. 99, cl. 4, the right is restricted to not inflicting more harm than it is necessary to inflict for the purpose of defence.—*Queen* v. *Gobardhun Bhuyan*, 4, B. L. R., Ap., 101.

48. An officer subordinate to an officer in charge of a police-station who was deputed by the latter to make an inquiry under s. 114, Code of Criminal Procedure, attempted, without a search-warrant, to enter a house in search of property alleged to have been stolen, and was obstructed and resisted.

Held (applying s. 99, Penal Code) that even though the police-officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice.—*Reg.* v. *Venkatrav Shrinivas*, 7, Bom. H. C. R., 50.

S. 100.

49. It is no misdirection on the part of a Judge in not calling the attention of the jury to cls. 1 and 2, s. 100, Penal Code, when he particularly called attention to cl. 6.—17, W. R., Cr., 45.

S. 102.

See ss. 97 & 99.

S. 104.

50. In investigating a case of land-dispute under Chapter XXII., Act XXV., 1861, the Magistrate found that one party was in possession; but there being a charge against both parties of rioting under s. 147, Penal Code, he punished both parties. *Held*, that the party in possession was protected by s. 104, Penal Code, in maintaining possession.—10, W. R., Cr., 64.

S. 107.

51. An omission to give information that a crime has been committed does not, under s. 107, Penal Code, amount to abetment, unless such omission involves a breach of a legal obligation. A private individual is not bound by any law to give information of any offence which he has seen committed.—*Queen* v. *Khadim Sheik*, 4, B. L. R., A. Cr., 7.

52. A person cannot be convicted of abetment of a false charge, solely on the ground of his having given evidence in support of such charge.—*Queen* v. *Ram Panda*, 9, B. L. R., Ap., 16.

53. Where a head-constable, who knew that certain persons were likely to be tortured for the purpose of extorting confession, purposely kept out of the way, he was held guilty of abetment under expl. 2, s. 107, Penal Code.—21, W. R., Cr., 11.

54. A person who consented to form one of a party who committed theft, and resiled from his agreement, but was present at the theft, does not come within cl. 2, s. 107, Penal Code, and ought not to have been convicted of the theft, but of the abetment thereof, under cl. 3, s. 107, and s. 109.—8, W. R., Cr., 78.

55. S was charged with the preparation of a certain record, and was in the habit of preparing it from certain abstracts made and read to him by D. D made and read false abstracts, whereby an incorrect record was prepared. The Court was of opinion that D could not strictly be held to have committed the offence described in s. 218, Penal Code.

He was guilty, however, of abetment of the offence described in that section, and not the less so that S had no guilty knowledge or intention in the matter.—*Queen* v. *Brij Mohan Lal,* 7, N. W. P., 134.

S. 108.

56. What acts of subsequent abetment are contemplated by s. 108, Penal Code.—18, W. R., Cr., 28.

S. 109.

(See ss. 21, 107.)

57. The offence of abetment under the Indian Penal Code is a substantive offence. The conviction of an abettor, therefore, is no way dependent on the conviction of the principal. Where a Magistrate convicted both principal and abettor, the Sessions Judge acquitted the principal and therefore the abettor; the High Court upheld the acquittal of the principal, but directed the restoration of conviction of the abettor.—I. L. R., 1, Bom., 15. *Queen* vs. *Marati Dada.*

S. 109.

58. Under s. 109, Penal Code, the abetment must be of an offence punishable under the Code, and not under a distinct and special law.—7, W. R., Cr., 54.

59. A person who consented to form one of a party who committed theft, and resiled from his agreement, but was present at the theft, does not come within cl. 2, s. 107, Penal Code, and ought not to have been convicted of the theft, but of the abetment thereof, under cl. 3, s. 107, and s. 109.—8, W. R., Cr., 78.

S. 114.

60. This section simply provides for the punishment of those who by English law are termed principals in the second degree. Those who are present aiding and abetting an offence are to be deemed to have committed the offence, though in point of fact another actually committed it. There is nothing inconsistent in charging them as principals.—4, Mad. H. C. R., 37.

61. When a person abets the commission of an offence, and is present at the time when it is committed, he should be tried under s. 114, Penal Code, for the same offence as the principal.—*Reg.* v. *Chima*, 8, Bom. H. C. R., 164.

62. If an abetter of a crime is, on account of his presence at its commission, to be charged under s. 114, Penal Code, as principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence is not committed with his continuing abetment.—*Reg.* v. *Amrita*, 10, Bom. H. C. R., 497.

63. Where a number of persons come and forcibly carry off crops, they are, with reference to s. 114, Penal Code, all guilty of theft under s. 378, even though any of them took no part in the actual taking.—8, W. R., Cr., 59.

S. 116.

Vide s. 363.

64. A Police Magistrate has power to convict summarily under Bengal Act IV. of 1866, s. 26, for an offence punishable under s. 116 of the Penal Code.—1, B. L. R., O. Cr., 39.

65. Where the accused was charged under s. 116, Penal Code, with abetment of an offence punishable under s. 161, the person abetted having been a civil surgeon of a sudder station,—*held*, that the enhanced punishment prescribed by the latter part of s. 116 could not be awarded, as the civil surgeon was not a public servant within the meaning of that section.—21, W. R., Cr., 9.

S. 118.

66. It is not necessary under s. 194, Penal Code, that the false evidence which is given should be evidence given in a Court of Justice. Such statement, if made to a police-officer, would amount to the offence of giving false evidence as defined by s. 191 taken together with s. 118. —20, W. R., Cr., 41.

REPORT OF THE INDIAN LAW COMMISSION.

WE, the Commissioners* appointed to enquire into and consider the Bills marginally noted and to report thereon, and to make such suggestions as to the codification of the Substantive Law of British India as may seem desirable, have now the honour to report to the Governor-General in Council our opinion as follows:

The Negotiable Instruments Bill.
The Transfer of Property Bill.
The Alluvion Bill.
The Master and Servants Bill.
The Easements Bill.
The Trusts Bill.

I.

In the correspondence extending over several years which has resulted in the appointment of the Commission it has been laid down and repeated that "the question of giving a Civil Code to India was no longer an open one." The only question, one of great practical difficulty, has been as to "the best machinery for carrying on Indian codification." In what precise sense "code" and "codification" have been used, and whether they have always been used in the same sense, is not perhaps quite certain; but for practical purposes the words may be taken, we apprehend, as referring to the systematic legislation resulting in such works as the Succession Act, the Penal Code, and the Codes of Civil and Criminal Procedure. A Code as applied to the laws just named means an orderly and systematic arrangement of the rules relating to some well-marked department of the field of jural rights and duties. In its larger sense of a general assemblage of all the laws of a community no attempt has as yet been made in this country to satisfy the conception of a Code. The time for its realization has manifestly not arrived. The rapid changes going on in social relations make it difficult to appreciate the exact extent to which laws of even a limited scope have furthered or retarded progress. The different principles involved in them have not been so wrought out to their final consequences that their ultimate consistency or inconsistency and their relative value can be pronounced on with absolute confidence. When the effects of the special laws have been ascertained by their persistence under varying

* The following are the names: The Hon. Whitley Stokes, C.S.I., the Hon., Charles Turner, C.I.E., and the Hon. Raymond West.

circumstances, the causes will become apparent by comparison, and the general principles will be established, on the suitability of which to the people and their circumstances it will then be safe to proceed in the work of final consolidation and arrangement. In the meantime, codification in the less ambitious sense may properly proceed in meeting exigencies which daily experience brings to light along with the materials out of which the appropriate fabric may in each case be formed.

2. This, as we understand it, was the general idea of legislation which the Government of India intended to insist on in its letter No. 34, dated 10th May 1877. After pointing out the positive gaps in the system which must needs be filled up, that letter says that the "task of arranging scientifically the various chapters of the Civil Code thus produced would then remain."

It has been objected that this plan of ultimate scientific arrangement "seems to mix up two radically different ways of looking at law," namely, that which may be called the historical, in that it simply gathers up in orderly synthesis the results of ascertained development, and the abstract, or as it has been called the anti-historical method, which, taking its stand on the "permanent elements of society and human nature," works out from these "an orderly exposition of fundamental principles" "followed by a statement of all their leading practical applications." We have to confess that we are unable to perceive the inconsistency complained of, or to appreciate the force of the argument adduced in support of the recommendation that, while particular sections of a complete and systematic body of civil law are proceeded with, the notion of their eventual combination in due co-ordination as parts of a single and general Code ought to be abandoned.

3. Although it is necessary, in the circumstances under which Indian legislation is carried on, to deal with the several branches of the law by distinct Acts, yet the ultimate design of forming these Acts into a general Code ought never, in our opinion, to be lost sight of. Every Statute, if it is to be self-consistent and duly proportioned, must be framed with reference to some central group of ideas which dominate the whole work. In constructing a system of laws the same principle should prevail. Although the rule of construing by reference to each other all laws which relate to the same matter does not extend to Statutes relating to different subjects, yet it is obvious that the same

principles may be involved in Acts which bear on very different departments of civil rights and duties. The impressions received from a study and application of one branch of the law cannot be cast off in expounding and applying another; nor is it possible that really just and philosophical conceptions of law as an organic structure should gain possession of the minds of the community, or even of the legal profession, unless the minor generalizations embodied in particular laws centre in higher generalizations drawn from the elementary truths of human nature and experience. Unless such a co-ordinating influence is allowed to operate, the development of the law, and the social growth of the community so far as it is affected by the law, must proceed irregularly and disproportionately. In one department a particular set of ideas, which lend themselves readily to the purpose, will obtain an expansion and a predominance which are at the same time gained in another by a different set of ideas. In the course of time and the complications of human affairs the two come into collision. One must give way, and yet neither can do so without litigation, waste of energy, and personal suffering. Nothing less, perhaps, than an infallible prescience of events, together with a power and precision of language not yet vouchsafed to man, would enable a legislature to construct a system of laws involving in all its ramifications no inconsistency or want of adaptation to its intended purposes; but that affords no reason why the inevitable shortcomings should be aggravated by inattention. If a Code cannot be thrown off, as we know it cannot, by one effort of a wise and comprehensive intellect, the alternative system should be brought as nearly as possible to such a production by being animated throughout with a uniform spirit and logical method, securing, so far as may be, an essential harmony amid multitudinous details.

4. It is true that when legislation proceeds by special laws, more complete and minute attention is paid to the detailed provisions called for by the particular circumstances dealt with. But in the practical application of such laws it often becomes evident through the logical development of one set of rules that it has proceeded upon an underlying conception inconsistent with the radical idea or group of ideas involved in another special law. As the relations, then, which have revealed the latent antinomy are likely to arise again and again, it becomes necessary to subjugate the one principle to the other either by formal legislation or by a forced method of interpretation, with the injurious consequences

to which we have adverted. In the case of a Code such a result can hardly arise. The leading ideas of legal relation govern the whole, and the development of each part is worked out harmoniously on the same general basis of rights and duties, however they in detail may be modified by the particular kind of activity that has to be enforced or controlled, or the kind of physical objects to which they are directed. Such is the consummation to which legislation pursued in a philosophical spirit must necessarily tend; but in India we have not at hand such materials as those out of which the Roman Code and the modern Codes of Europe were formed. The responses of a long succession of jurisprudents, the commentaries of the legists extending over centuries, are wanting. Society itself, profoundly altered in external conditions, and subjected to the operation of conflicting currents of thought, is in a state of flux, the result of which may differ widely from the course of evolution of modern institutions in Europe from their germs in the dark ages. We must provide not only for permanent needs, but for pressing exigencies of the passing time; yet, in proportion as great changes are suitable, we ought, so far as we can, to introduce amongst the materials of the future some constant and stable elements, the virtue of which has been proved by the test of time and of manifold experiment; and which it may reasonably be expected will give a tone and character to the whole system in which they are incorporated. Englishmen, indeed, brought up in the midst of influences which give to them so marked and peculiar a political character, will move spontaneously along lines in legislation, as in other fields of action, determined for them in a great measure by their own history and their law. Their general tendency will be pretty uniform; but this should not exclude the careful analysis of all that the past and the present of English law and English ideas offer for our adoption, the conscious selection from the mass of those principles which promise to be most strong, fruitful, and beneficent, and the persistent endeavour to give them recognition and a governing influence throughout the fragmentary legislation to which for some time and for some purposes we are confined. The separate laws, being thus controlled, will be in the main consistent and capable at the proper time, without any harsh disturbance of interests, and almost without a perceptible break of continuity, of uniting into a single and well-compacted general Code.

(To be continued.)

S. 140.

54. Where a policeman in whose sight a theft was committed arrested the thief, and, being himself unable to take or send the accused to a Magistrate, sent a report, on which the Magistrate issued a warrant:

Held, that under these circumstances, the accused was legally brought before the Magistrate.—*Reg.* v. *Mahippa valad Bomya Mahar* 5, Bom. H. C. R., 99.

55. Where an accused person appears voluntarily before a Magistrate to answer a charge, no complaint is necessary.

Semble—A Magistrate taking a complaint, and issuing a summons thereon, acts, not ministerially, but judicially.

Conditions under which a Magistrate may proceed with an investigation or trial with a complaint upon oath considered, and cases bearing on the question reviewed and explained.—*Reg.* v. *Sadashivappa Pandurangappa*, 5, Bom. H. C. R., 29.

56. Conviction and sentence under s. 3, Act X., 1862 (Stamp Act), reversed, because no complaint had been made before the trying Magistrate.

A memorandum under the signature of the Collector, sanctioning the prosecution, cannot be accepted in the place of a complaint so as to authorize the issuing of a summons.—*Reg.* v. *Bai Divali*, 5, Bom. H. C. R., 48.

S. 141.

57. A Magistrate of the third class, who is not specially invested with powers under s. 23, Code of Criminal Procedure, has no jurisdiction to try a case on the report of a police-officer, or on a complaint directly preferred to him.—*Reg.* v. *Shankar Abaji Hoshing*, 6, Bom. H. C. R., 69.

58. A Magistrate of the third class can try a person accused of a cognizable offence, who has been forwarded to him by an officer in charge of a police-station under s. 123, Code of Criminal Procedure.—*Reg.* v. *Lala Shambhu*, 10, Bom. H. C. R., 70.

59. A Magistrate, who is otherwise competent, has under s. 141, Act X., 1872, a discretion to inquire into and try a person on any charge which he may consider covered by the facts complained of by any person, or reported by the police, without reference to the particular charge that may have been preferred by the complainant or by the police, and

without reference to the procedure which, when he has determined the offence with which he will charge the accused, it will be competent to him to adopt.

Held, therefore, when a person was brought before a Magistrate by the police, charged with an offence under s. 457, Penal Code, an offence not triable in a summary way, that the Magistrate was competent to alter the charge to one under s. 411, and try the accused summarily under the provisions of s. 222, Act X., 1872.—In the matter of *Mewa*, 6, N. W. P., 254.

S. 142.

60. S. 68, Criminal Procedure Code, applies only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint. That section is intended for the purpose of enabling a Magistrate to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases the jurisdiction to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge must be either personal or derived from testimony legally given. The report of the police, or any statement which falls short of an actual formal complaint, or of a statement made on oath, is not sufficient in law to give a Magistrate jurisdiction to issue his warrant. In this case, although the Magistrate had acted illegally before evidence was recorded, and had shown a want of discretion in some of the stages, the High Court refused to quash the Magistrate's order directing the prisoners to be put upon their defence, on the ground that the order had been made by a competent officer after hearing evidence which was judicially received and recorded. In the matter of the Petition of *Surendranath Roy; Queen* v. *Surendranath Roy*, 5, B. L. R., 274.

S. 144.

61. A charged B before a Magistrate for wrongful confinement of her brother. Previous to the petition to the Magistrate, the charge had been investigated by the police, and reported to be false. The Magistrate, without recording the complaint under s. 66, Code of Criminal Procedure, sent for the police-papers, and under s. 180 of the same Code dismissed the case.

Held, that the proceedings were illegal; that the Magistrate was bound, under s. 66, Code of Criminal Procedure, to record the examination of the complainant before he could, under s. 180, dismiss the complaint.—*Dulali Bewa* v. *Bhuban Shaha*, 3, B. L. R. (A. Cr.), 53.

62. Where a Magistrate had examined the complainant under s. 66, Act XXV., 1861, and dismissed the complaint under s. 67,—*held*, that the High Court would not interfere under s. 434.—*Queen* v. *Foktu Shah*, 2, B. L. R. (S. N. VI.).

S. 146.

63. The previous enquiry provided for by s. 146, Act X., 1872, before a complaint is taken up, ought not to be made after the accused has been brought before the Court under a warrant.—21, W. R., Cr., 44.

64. When once a complaint of an offence which cannot be compounded is before a Magistrate, he is bound (unless proceeding under s. 146, Act X., 1872) to make a complete enquiry, and to see that the accused, if guilty, is brought to punishment.—22, W. R., Cr., 83.

65. The accused was charged before a Deputy Magistrate with an offence under s. 431, Penal Code. The Deputy Magistrate examined the complainant, took bail from the accused, but refused to examine the complainant's witnesses, although present, and delayed the investigation unnecessarily for a long time. The Magistrate of the district then called for the proceedings, and, having looked at them, considered that there was no case for the interference of the Criminal Courts, and discharged the prisoner, although he was present and under bail. *Held*, that the Magistrate was not only competent but bound to discharge the prisoner, if his conclusion that no offence was made out was correct. But held also, that the Magistrate's conclusion was wrong, and that the act complained of, if true, did amount to an offence under s. 431, Penal Code; therefore the Magistrate's order was set aside, and further enquiry ordered.—*Niamutulla* v. *Gopal Saha*, 11, B. L. R. (Ap.), 6.

S. 147.

66. Where a Magistrate removed a case from the file of the Joint-Magistrate to his own after complaint had been made and warrants issued by the Joint-Magistrate upon the footing of the complaint, and thereupon suspended the warrant and dismissed the complaint without hearing it in due course of procedure,—*held*, that it was an improper proceeding; he ought to have proceeded with the case from the stage at which it was when he removed it.—In the matter of the Petition of *Raghoo Parirah*, 10, B. L. R. (Ap.), 26.

67. Sanction was given by the Magistrate for the institution of criminal proceedings against the defendant for having made a false charge against the complainant. The Magistrate dismissed the complaint on the ground that the complainant had taken no steps to prosecute for three months after the sanction was given. *Held*, that the Magistrate had power to dismiss the complaint.—6, Mad. H. C. R., 15.

68. A Magistrate is bound to examine a complainant before issuing process or dismissing a complaint under this section.—4, Mad. H. C. R., 162.

S. 148.

69. Acts or omissions punishable under s. 29, Act V., 1861, come within the category of offences referred to in s. 8 and also s. 148, Act X., 1872.—25, W. R., Cr., 20.

S. 152.

70. A Magistrate is bound to state in every summons the place at which the person summoned is to appear.—7, Mad. H. C. R., 43.

S. 154.

71. Magistrates may issue summonses for service upon witnesses residing beyond the limits of their districts.—3, Mad. H. C. R., 5.

72. The mere showing to a witness of a summons is not sufficient service. Either the original should be left with the witness or should be exhibited to him, and a copy of it delivered or tendered.—*Reg.* v. *Karsanlal Danatram*, 5, Bom. H. C. R., 20.

S. 157.

73. It is not essential to the validity of a warrant issued under s. 157, Act X., 1872, that the Magistrate issuing it should be, at the time he issues it, within the local limits of his jurisdiction. He may issue such a warrant from a place in foreign territory.—*Reg.* v. *Locha Kala*, I. L. R., 1, Bom., 340.

THE RELIGIOUS SOCIETIES ACT.

No. I. of 1880.

Passed by the Governor-General of India in Council.

[*Received the Governor-General's assent on the 9th January 1880.*]

AN ACT TO CONFER CERTAIN POWERS ON RELIGIOUS SOCIETIES.

Preamble.

Whereas it is expedient to simplify the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose, and to provide for the dissolution of such bodies and the adjustment of their affairs and for the decision of certain questions relating to such bodies; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Religious Societies Act, 1880:"

Commencement.

It shall come into force at once; and

Local extent.

shall extend to the whole of British India;

but nothing herein contained shall apply to any Hindús, Muhammadans, or Buddhists, or to any persons whom the Governor-General in Council may, from time to time, by notification in the *Gazette of India* exclude from the operation of this Act.

Appointment of new trustee in cases not otherwise provided for.

2. When any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any property,

and such property has been or hereafter shall be vested in trustees in trust for such body,

and it becomes necessary to appoint a new trustee in the place of or in addition to any such trustee or any trustee appointed in the manner hereinafter prescribed,

and no manner of appointing such new trustee is prescribed by any instrument by which such property was so vested or by which the trusts on which it is held have been declared, or such new trustee cannot for any reason be appointed in the manner so prescribed,

such new trustee may be appointed in such manner as may be agreed upon by such body, or by a majority of not less than two-thirds of the members of such body actually present at the meeting at which the appointment is made.

Appointment under section 2 to be recorded in a memorandum under the hand of the chairman of the meeting.

3. Every appointment of new trustees under section two shall be made to appear by some memorandum under the hand of the chairman for the time being of the meeting at which such appointment is made.

Such memorandum shall be made in the form set forth in the schedule hereto annexed, or as near thereto as circumstances allow, shall be executed and attested by two or more credible witnesses in the presence of such meeting, and shall be deemed to be a document of which the registration is required by the Indian Registration Act, 1877, section seventeen.

Property to vest in new trustees without conveyance.

4. When any new trustees have been appointed, whether in the manner prescribed by any such instrument as aforesaid or in the manner hereinbefore provided, the property subject to the trust shall forthwith, notwithstanding anything contained in any such instrument, become vested, without any conveyance or other assurance, in such new trustees and the old continuing trustees jointly, or, if there are no old continuing trustees, in such new trustees wholly, upon the same trusts, and with and subject to the same powers and provisions, as it was vested in the old trustees.

Saving of existing modes of appointment and conveyance.

5. Nothing herein contained shall be deemed to invalidate any appointment of new trustees, or any conveyance of any property, which may hereafter be made as heretofore was by law required.

Provision for dissolution of societies and adjustment of their affairs.

6. Any number not less than three-fifths of the members of any such body as aforesaid may at a meeting convened for the purpose determine that such body shall be dissolved; and thereupon it shall be dissolved forthwith, or at the time then agreed upon; and all necessary steps shall be taken for the disposal and settlement of the property of such body, its claim and liabilities, according to the rules of such body applicable thereto, if any, and if not, then as such body at such meeting may determine:

Provided that, in the event of any dispute arising among the members of such body, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of such body is situate; and the Court shall make such order in the matter as it deems fit.

Upon a dissolution no member to receive profit.

7. If upon the dissolution of any such body there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of such body or any of them, but shall be given to some other body of persons associated for the purpose of maintaining religious worship or some other religious or charitable purpose to be determined by the votes of not less than three-fifths of the members present at a meeting convened in this behalf, or in default thereof by such Court as last aforesaid.

Saving of certain provisions of instruments.

8. Nothing in sections six and seven shall be deemed to affect any provision contained in any instrument for the dissolution of such body, or for the payment or distribution of such property.

Questions may be submitted to High Court.

9. When any question arises, either in connection with the matters hereinbefore referred to, or otherwise, as to whether any person is a member of any such body as aforesaid, or as to the validity of any appointment under this Act, any person interested in such question may apply by petition to the High Court for its opinion on such question. A copy of such petition shall be served upon, and the hearing thereof may be attended by, such other persons interested in the question as the Court thinks fit.

Any opinion given by the Court on an application under this section shall be deemed to have the force of a declaratory decree.

The costs of every application under this section shall be in the discretion of the Court.

SCHEDULE.

THE SCHEDULE.

(*See section 3.*)

Memorandum of the appointment of new trustees of the (*describe the church, chapel, or other buildings and property*) situate at a meeting duly convened and held for that purpose (*in the vestry of the said*) on the day of 18 , *A. B.* of Chairman.

Names and descriptions of all the trustees on the constitution or last appointment of trustees made the day of

(*here insert the same*).

Names and description of all the trustees in whom the said (*chapel and property*) now become legally vested.

First.—Old continuing trustees :—

(*here insert the same*).

Second.—New trustees now chosen and appointed :—

(*here insert the same*).

Dated this day of 18 .

Signed by the said *A. B.* as Chairman of the said Meeting, at and in the presence of the said Meeting on the day and year aforesaid in the presence of—

A. B.,
Chairman of the said Meeting.

C. D.
E. F.

16. *Thus*, having at once pervaded, with emanations from the Supreme Spirit, the minutest portions of six principles immensely operative, *conciousness and the five perceptions*, He framed all creatures;

17. And since the minutest particles of visible nature have a dependence on those *six* emanations from GOD, the wise have accordingly given the name of *s'aríra or depending on six, that is, the ten organs on consciousness, and the five elements on as many perceptions*, to His *image or* appearance in visible nature:

18. Thence proceed the great elements, endued with peculiar powers, and Mind with operations infinitely subtil, the unperishable cause of all apparent forms.

19. This *universe*, therefore, is compacted from the minute portions of those seven divine and active principles, *the great Soul, or first emanation, consciousness, and five perceptions; a* mutable *universe* from immutable *ideas*.

20. Among them each succeeding element acquires the quality of the preceding; and, in as many degrees as each of them is advanced, with so many properties is it said to be endued.

21. HE too first assigned to all creatures distinct names, distinct acts, and distinct occupations; as they had been revealed in the preexisting *Véda*.

22. HE, the supreme Ruler, created an assemblage of inferior Deities, with divine attributes and pure souls; and a number of Genii exquisitely delicate; and he *prescribed* the sacrifice ordained from the beginning.

23. From fire, from air, and from the sun he milked out, *as it were*, the three primordial *Védas*, named *Rich*, *Yajush*, and *Sáman*, for the due performance of the sacrifice.

24. HE gave being to time and the divisions of time, to the stars also, and to the planets, to rivers, oceans, and mountains, to level plains, and uneven valleys.

25. To devotion, speech, complacency, desire, and wrath, and to the creation, *which shall presently be mentioned;* for He willed the existence of all those created things.

26. For the sake of distinguishing actions, He made a total difference between right and wrong, and enured these sentient creatures to pleasure and pain, *cold and heat*, and other opposite pairs.

27. With very minute transformable portions, callled *mátrás*, of the five elements, all this *perceptible world* was composed in fit order;

28. And in whatever occupation the supreme Lord first employed any vital soul, to that occupation the same soul attaches itself spontaneously, when it receives a new body again and again.

29. Whatever quality, noxious or innocent, harsh or mild, unjust or just, false or true, He conferred on any being at its creation, the same quality enters it *of course on its future births;*

30. As the *six* seasons of the year attain respectively their peculiar marks in due time and of their own accord, even so the several acts of each embodied spirit *attend it naturally.*

31. That the human race might be multiplied, He caused the *Bráhmen*, the *Cshatriya*, the *Vaisya*, and the *Sudra* (so named from the *scripture, protection, wealth*, and *labour*) to proceed from his mouth, his arm, his thigh, and his foot.

32. Having divided his own substance, the mighty Power became half male, half female, or *nature active and passive;* and from that female he produced VIRAJ:

33. Know Me, O most excellent of *Bráhmens*, to be that person, whom the male *power* VIRAJ, having performed austere devotion, produced by himself; Me, the *secondary* framer of all this *visible world.*

34. It was I, who, desirous of giving birth to a race of men, performed very difficult religious duties, and first produced ten Lords of created beings, eminent in holiness.

35. MARÍCHI, ATRI, ANGIRAS, PULASTYA, PULAHA, CRATU, PRACHETAS, OR DACSHA, VASISHT'HA, BHRIGU, and NA'RADA:

36. They, abundant in glory, produced seven other *Menus*, together with deities, and the mansions of deities, and *Maharshis*, or great Sages, unlimited in power;

37. Benevolent genii, and fierce giants, blood-thirsty savages, heavenly quiristers, nymphs and demons, huge serpents and snakes of smaller size, birds of mighty wing, and separate companies of *Pitris*, or progenitors of mankind;

38. Lightnings and thunder-bolts, clouds and coloured bows of *Indra*, falling meteors, earth-rending vapours, comets, and luminaries of various degrees;

SUPPLEMENT.

EXTRACTS.

ENGLISH WORKS ON HINDU LAW.

(*Bengal Magazine, December 1879.*)

English Works on Hindu Law are those treatises which touch upon the principles of Hindu Law, written in English by Europeans as well as by Natives. They deserve special attention on account of the constant reference made to them in the administration of justice to Hindu suitors. It is to the English manuals of Hindu Law that judicial officers and legal practitioners, who are unacquainted with Sanskrit Law books, direct their attention for the solution of legal questions.

The works on Hindu Law written in English, as observed by Dr. Burnell, are mostly poor, careless and wrong compilations by non-Sanskritists who introduce their own theories and notions into their compositions. They do not refer to the authoritied of the schools in support of the legal doctrines laid down by them. The English treatises on Hindu Law by Sanskrit scholars are not even free from deficiencies and errors. But English works, which dwell upon the Hindu Law as it is, are very rare.

A few treatises on Hindu Law written in English, though deficient and erroneous in many respects, have gained so much celebrity and authoritative weight that they are invariably regarded in the light of infallible guides, and are occasionally allowed to override even the original authorities and their accurate translations.

A Treatise on Obligation and Contracts was written by Mr. Henry Thomas Colebrooke, a distinguished oriental scholar and a high European authority on Hindu Law It was published in London in 1818. It is not a work exclusively dealing with the doctrines of the Hindu Law of contracts, but treating of the general principles of law on the subject. The illustrations of the principles laid down in the book have been largely drawn from the system of Hindu Law. Much valuable information regarding the Hindu Law of contracts may be gleaned from it. Unfortunately the work was not completed by the learned author, for both the preface and the introductory matter, which the writer promised in the first and only printed part to publish, did not appear. Had the treatise been in a complete state, it would have thrown additional light on the subject. Notwithstanding the passing of the Indian Contract Act, IX. of 1872, Mr. Colebrooke's treatise on Obligations and Contracts may be used and consulted with advantage by the tribunals, which have not yet been deprived of their right to administer the Hindu Law of Contracts to Hindu litigants.

The Honorable Sir Francis Workman Macnaghten, one of the Puisne Justices of the late Supreme Court of Judicature at Fort William in Bengal, wrote a work entitled " Considerations on the Hindu Law, as it is current in Bengal." In 1824

the book was printed at Serampore. The work is principally devoted to the consideration of the subjects of Inheritance, Partition, Re-union, Adoption, Gifts and Unequal Distribution, Wills, Contracts, Judicial Proceedings, and Evidence. It contains a preface, an appendix, a table of succession as given in Mr. Wynch's Daya krama Sangraha, addenda, and an index. The preface speaks, amongst other things, very unfavorably of Hindu law and of Pandits, and yet at the same time defend them. The appendix relates to the topic of Adoption. The addenda to the chapter of Inheritance consist of extracts from Colebrooke's Daya Bhaga. The addendum to the chapter on Adoption, which occupies the greatest portion of the work, as well as the appendix mentioned before, comprise the opinions of the Pandits delivered in the several cases bearing upon the subject. In the chapter on adoption Mr Blacquiere's English translation of the Dattaka Nirnaya has been reproduced. Unsparing use is made of Colebrooke's version of the texts ordaining the law of Contracts from the Vivada Bhangarnava. The last two chapters chiefly comprise the translation of the Mitakshara on Judicial Proceedings and Evidence by the writer's worthy son Sir William Macnaghten. The work professes to discuss the principles of Hindu Law prevailing in the Bengal School Instead of closely following the recognized Bengal authorities in the enunciation and discussion of the legal principles laid down in the book, the author has suffered himself to abide for the most part by the Hindu Law officers' opinions and numerous judicial decisions The principles of Hindu Law are amply explained by arguments, and copiously illustrated by sundry cases given for the most part in full The author's ignorance of the Sanskrit law books is, however, betrayed by the adoption of judicial rulings to which he invariably refers as his chief authorities in support of what has been written without properly testing their accuracy It has probably led him to think that the principles collected and deduced from the forensic judgments alluded to in his work should be adopted, and, if adopted, should remain immutable. On the merits of Macnaghten's "Considerations" Sir Thomas Strange and Mr. William Morley appear to be divided in their opinions. The former approves the work, while the latter disapproves of it. The view taken by Sir Thomas Strange is as follows :—"It is an extremely valuable one to any one engaged in the study or administration of the Hindu Law. The author was himself administering it when he compiled the work in question, being at the time one of the Judges of the Supreme Court in Bengal; for which reason it is much that he could find the requisite leisure; and though, on this account, it is not arranged as he could have wished, it is full of important materials, introduced, and commented upon, in most instances, with observations, deserving the greatest attention, wherever the same points shall come to be discussed." Mr. Morley thus speaks of the treatise :—"It is to be regretted that the whole work is pervaded by a spirit of exaggerated self-estimation and unjust depreciation of every thing not consonant with the author's professional prejudices." It may not be altogether out of place to cite here the opinion of Mr. Barradaile, the translator of the Vyavahara Mayukha. "The work of Sir F. Macnaghten, being avowedly controversial and founded on Bengal law, is of no utility as a guide here. Every one must regret that the two first chapters of the Mitakshara, those on judicial proceedings and evidence, were not given entire; valuable as any extracts from such a

work are, the insertion of the translation complete, would, we may venture to say, have doubled the value of this book to practical readers."

The treatise on Hindu Law by Sir Thomas Andrew Strange, the first Chief Justice of the Supreme Court of Madras, appeared in the year 1825. It was published in two volumes in London. The first volume was originally called the "Elements of Hindu Law," and the second Responsa Prudentum. In 1830 the author issued a second and revised edition of his work, consisting of the same number of volumes, under the title of "Hindu Law, principally with reference to such portions of it as concern the administration of Justice in India." The first volume of the second edition treats of Property, Marriage, Paternal Relation, Adoption, Slavery, Inheritance, Disabilities to inherit, Charges upon the Inheritance, Partition, Widowhood, Testamentary Power, and Contracts,--each of these subjects forming a distinct chapter. The second volume, which is in fact the appendix to the first, gives, in the order of the subjects discussed in the latter, cases and law opinions thereon referred to in it. Although Sir Thomas Strange had no knowledge of Sanskrit, he gained an insight into the laws and institutions of the Hindus from contemporary oriental scholars of repute. His work on Hindu Law is clearly arranged, aptly illustrated, and elegantly composed. The legal doctrines laid down in the first volume are almost founded upon the authorities noted on the foot of every page. The tenets of the Madras School have been more fully treated than those of any other schools. But the peculiar doctrines of the different schools are not in many an instance specified or distinguished. The second volume is a valuable record of Hindu Law. It comprises the opinions and remarks of learned scholars and lawyers, which are really *Responsa Prudentum.* The opinions of the Shastris of the Madras Presidency on the legal questions raised in the cases therefrom, forming the major portion of the bulk of the second volume, have been tested by the remarks of Messrs. Colebrooke, Ellis, and Sutherland, or one or other of them. Mr. Barradaile observes thus:—"Of the last work published, the Elements of Hindu Law, by Sir T. Strange, it is scarcely necessary to make mention, as it is in every one's hand, but if it be not too presumptious we may remark that the learned author has carefully followed the steps, and entirely adopted the doctrine and advice, of the greatest of all European authorities on the subject of Hindu Law and Literature, which is of itself sufficient to stamp a high value on the book."

Mr. John Mayne, Professor of Law in the Madras Presidency College, edited the first volume of Sir Thomas Strange's Hindu Law with an able and interesting introduction. The learned editor notices, in his introduction, the material changes wrought upon the Law by legislative enactments and judicial decisions. Irrespective of the introduction, this edition is a re-print of what immediately preceded it, and is the third edition of Sir Thomas Strange's Elements of Hindu Law. It was printed at Madras in 1859. Mr. Mayne speaks of the books thus:—"In fact. Sir Thomas Strange's treatise has done more than merely collecting the authorities upon Hindu Law. It has settled the law. The references to original law books still appear at the foot of his pages, but it is rarely that any consult them. We rely unhesitatingly upon the assiduous accuracy which collected so many sources of information, and the exquisite judgment which evolved an orderly system from conflicting opinions. Few will search for themselves through Manu or the Mitakshara, when they can find its substance brought out in the masterly English of the Chief Justice of Madras. Few

will enquire into the rival views of *Srikrisna* or *Yajnyavalkya*, when the balance between them has been struck by a single weighty sentence of Sir Thomas Strange. Accordingly it would be difficult to find a second law book which at the end of thirty years could be re-printed *verbatim*, with any advantage to the public; yet the present work hardly requires any re-editing. Statutory enactments have rendered obsolete some few portions. Doctrines have been illustrated and amplified by recent decisions, but little has been either doubted or over-ruled. The Indian Courts are still governed as authoritatively by Sir Thomas Strange, as the old philosophers were by Plato or Aristotle." In our humble opinion Sir Thomas Strange's work does not deserve such extravagant and unqualified praise.

The fourth edition of Sir Thomas Strange's Elements of Hindu Law was by Mr. W. P. Williams, and published at Madras in 1864. It is a re-print of Mr Mayne's edition with an additional preface, a few foot-notes, and an addendum. The additions have enhanced the practical value of the treatise. The addendum, which has been also separately published, will be noticed, under the head of Forensic Decisions. The fifth edition of the work was published at Madras in 1877.

(To be continued.)

BREACH OF PROMISE OF MARRIAGE.

(*Home News, August 8.*)

A breach of promise case has been tried at the Cork assizes. The plaintiff was Miss Julia M'Evers, and the defendant Mr. W. Lane O'Neill, a solicitor, practising in London. The plaintiff is the youngst daughter of the late Dr. M'Evers, a physician who had an extensive practice in Cork, and the defendant is also a native of Cork. The plaintiff had been at a school at Abingdon, and in the year 1876 her brother and her aunt proceeded to London for the purpose of bringing her home. She was then 16 years of age. In London they met the defendant, who was for the first time introduced to Miss M'Evers. During their stay there the defendant showed marked attention to the young girl, and this was the beginning of the acquaintance. In 1878 Mr. O'Neill went to Cork for the purpose of delivering a lecture on "Irishmen in England," and the acquaintance with Miss M'Evers was renewed. He frequently dined at her friends' houses, and expressed admiration for the plaintiff. He visited Cork again during the same year, and in an interview he had with the plaintiff's uncle, Mr. Bourke, he intimated his intention to marry the lady, and spoke as to her prospects. He stated that there were some business obstacles to his marriage. Up to this time he had not written any letters to the lady, but had made her several presents, including a ring, a gold watch, and some souvenirs. Shortly after leaving Cork in October he wrote from Dublin:—"Monday, 5 a.m.—My dear Julia,—As I arranged, I have great pleasure in writing direct to you instead of to Walter. The past few days were spent very pleasantly with you. Thrice happy days! I should like to have them over again. Ah, me! how quickly they passed away. I write with deep emotion. I have not yet got over the pain of parting.—Believe me, my dear Julia, yours sincerely, William Lane O'Neill." A regular correspondence was

then kept between the parties, the defendant's letters breathing sentiments of the deepest affection. From London he wrote :—" I now write to you accordingly, I said to you on Monday, in reply to Walter's question, that it was uncertain when I should return to Cork ; but you will know my solemn resolve—that, whether in Cork or elsewhere, I shall see you as soon as possible ; and the sooner the better. I travelled the whole way to London nearly alone. I did not care to enter into conversation with any one. I was glad to be left to my own thoughts, sad and loving concerning some one. You must guess who. The perfume of your last kiss still lingers on my lips. With those large blue eyes gazing on me and your fair arms twining round my neck—but I must not continue ; my heart is full.—Yours sincerely, W. Lane O'Neill." In another letter he wrote :—" I saw my dear Julia's face in the fire last night before which I was sitting in an arm-chair wrapt in thought for hours—thoughts of whom you must guess ; tender and loving ones all. I have had a slight cold, and so wish your blue eyes were here to act as a charmer. You say you have received a letter from an old admirer of yours, and have not yet answered it till you have received an answer from me. This, I must repeat, is a very odd thing. To be frank with my sweet blue eyes, I had absolutely placed entire faith in you.—Believe me for ever and ever yours very sincerely, William Lane O'Neill." So matters went on until in January, 1879, the plaintiff, who was then in Dublin, received a letter, which began—" Dear Madam,—Your letter received this morning. I wrote you several letters before you left Cork. You overlooked most of them altogether, and when you wrote I found you totally changed to me. You dwelt upon old admirers. Oh, I have tried to be for some time silent, merely remarking that it was very odd. I did not then, and I do not now, reproach you. As there was no engagement, I had, of course, no right to blame you, injured though I was, hurt and deeply pained though I was, at this return for my ardent affection and love. Yet suffering is the badge of my lot, and I forgive you." He continued—" Your silence and your coolness continued and increased in Dublin. The occasional line I received was very cold, and at last my letters were returned to me through the post-office unopened, which completed the story of a young man in search of a wife." Counsel concluded by calling on the jury to remark by their verdict their sense of the defendant's conduct. The plaintiff, her sister, her brother, and uncle were examined, and proved that the defendant was received by them as the accepted suitor of Miss M'Evers. He had inquired after her fortune, which was stated to be 1,300 in cash, with prospects of much more. The defence was opened on Friday, and the defendant was examined. He denied the contract. On one occasion he presented Miss M'Evers with a ring. She asked if it was to be considered an engagement ring, and he said, " No." The acquaintance was so very short, he was not at all prepared for so serious a suggestion. Witness admitted he liked the plaintiff, but denied that any arrangements were made for their marriage. The friends of the plaintiff endeavoured to tease him into an engagement, but he always said it was out of the question, as his acquaintance with Miss M'Evers was too short.—The jury on Monday found for the plaintiff damages 1,000*l*.

ANOTHER CASE OF BREACH OF PROMISE OF MARRIAGE.

M'GREGOR v. MORGAN.—This was an action for breach of promise of marriage. The defendant denied the alleged promise, and pleaded that if there was a promise to marry it was made when he was an infant. Mr. M'Intyre, Q.C., and Mr. Kingsford appeared for the plaintiff; Mr. Murphy, Q.C., and Mr. Mansel Jones represented the defendant.

The plaintiff is a daughter of Major M'Gregor, who in 1874 was living at Wood Green, in the north of London, and subsequently moved to Hounslow. The defendant is the son of a gentleman of considerable property, and the proprietor of the publication called the *Christian*. The two families were upon very friendly terms, and after June, 1876, the plaintiff and defendant were treated as if they were engaged; the consent to the match having been obtained at the time from the respective parents. In March, 1878, however, the defendant wrote saying that all communications, must cease, as he could no longer write what he did not mean or feel. Communications continued for some time longer, but ultimately ended in the present action being brought.

Miss Florence M'Gregor, the plaintiff, said: I am a daughter of Major M'Gregor, and in 1873 was living with him at Wood Green in the north of London. The defendant was living at Crouch-end in the same neighbourhood. In June, 1876, the defendant came to see my father, who was a major in the 78th Regiment, but was then retired. The defendant's father was the publisher of the *Christian*. There, or four days afterwards the defendant spoke to me saying, "Do you consider yourself engaged to me, as I consider myself engaged to you." I said that I considered myself engaged to him. I first knew the defendant in 1873. In August, 1876, the defendant went to Germany and Switzerland; in September, 1876, to New York; and in January, 1877, to Canada. Before the defendant went to Canada I saw him very often, and our intimacy continued as if we were engaged to each other. I received a letter from the defendant in January, 1877, while he was in Canada. He returned from Canada, I believe, at the end of February. From that time until July, 1877, we constantly met. We were living at the same places as we had done in June, 1876. I had written to the defendant on February 8, expressing my great surprise that he had decided to remain in Canada. I used an expression in that letter, "I only hope that I shall look out for another gentleman."

Mr. Kingsford: At whose suggestion did you use those words?

Mr. Mansel Jones: I object to the question.

Mr. Kingsford: Then I will not press it.

The Lord Chief Baron: If it is objected to it cannot be put. There is nothing in the letter to show that the sentence was suggested by the defendant's mother, with whom the plaintiff was then staying.

The plaintiff in answer to further questions said: On March 8, 1877, I received a letter from the defendant in which he said:—"My darling, will you accept the enclosed as a token of real love? I wish you many very happy returns of your

birthday, and may your future be brighter by far than the past has been is the wish of yours ever, Harry." A locket and chain was enclosed in the letter. I received another letter soon after, in which he signed himself as "ever your fondest Harry." On September 1, 1877 the defendant came of age, and a few days afterwards he gave me the ring which his mother gave him on his birthday. He said I was to wear the ring until he gave me an engaged one. The defendant at the time was learning farming at Mill Hall near Alton, Hants. In January, 1878, I saw the defendant as I was staying with his mother at Crouch-end. On January 1, I went with the defendant to London, and he said to me, "I want to buy you an engaged ring, but I have not sufficient money in my pokect to buy one now." I was then wearing the ring he had given me. He left Crouch-end on January 3 for Mill Hall, and more letters passed between us, in which the defendant signed himself, "Your ever loving Harry." I have not seen the defendant since. He broke off the engagement without my consent. Nothing occurred between us which justified his doing so.

In cross-examination by Mr. Murphy the plaintiff said: I first knew the defendant in 1874. The defendant used to see my sister and myself home, and upon one occasion a friend said to the defendant and myself, "You two seem to love each other." I said, "I do for my part." My sister said, "I'll see she does not flirt until you come back." I was then fourteen; and the defendant fifteen and a half. I did not consider myself engaged until June, 1876, when my parents gave their consent. When the defendant came of age I considered there was no need to obtain a fresh promise from him because I was already engaged to him. I looked upon one as one continual engagement. My father, in June 1876, said, "I have no objection to your being engaged, and matters may go on as they are." I told the defendant that I considered I was engaged to him. I understood my father to have given his consent.

In re-examination the plaintiff said: The defendant's father and mother knew of the engagement, and received me as being engaged to be married. In November, 1877, after the defendant came of age, he asked me whether I would be ready to marry him in a year or eighteen months. I said I was in no hurry.

Mrs. M'Gregor, the mother of the plaintiff, said she noticed that the defendant had a liking for her daughter some time before June, 1876. She considered they were engaged until the defendant broke it off.

Major James Duncan M'Gregor, the father of the plaintiff, said that on June 26, 1876, the defendant came to his house and spoke to him about the plaintiff. He told the defendant he had not the slightest objection to the engagement, but he thought they were both rather young. The defendant and plaintiff behaved as engaged people usually did in his house, and he raised no objection to it.

Miss Emily Mary M'Gregor said she was the plaintiff's elder sister. She was the lady to whom the defendant sent his love as "Sister Emily." The defendant was received as the plaintiff's future husband by her family, and the plaintiff was received as the defendant's future wife by the defendant's family. In September, 877, the defendant spoke to the plaintiff about being married, and asked whether she

would like a country-place or one at the seaside. After the breaking off of the engagement the plaintiff became low in her spirits.

Mr. Murphy, upon the conclusion of the plaintiff's case, submitted that there was no case to go to the jury, as it had been decided in the Common Pleas Division that a promise made in infancy and ratified afterwards was not a promise of marriage according to law. The case he referred to was that of "Coxhead v. Mullis" (Common Pleas Division, *Law Journal*, page 761).

The Lord Chief Baron said there was abundant evidence before the court of a promise of marriage after the defendant came of age, and that whether the promise had been ratified or not had therefore nothing really to do with the present case.

Mr. Murphy then said he called no evidence for the defence.

The Lord Chief Baron, in summing up, asked the jury whether, if the parties had never met before September 1, 1877, when the defendant came of age, they did not consider there was ample evidence of a distinct and substantial promise of marriage from the defendant to the plaintiff. If they found for the plaintiff, they would have to award such just and temperate damages as they considered she was entitled to, for the manner in which the defendant had outraged and wounded her feelings.

The jury gave a verdict for the plaintiff—damages £200. Judgment was given accordingly.

How to Pass an Examination in Law.—Examiner—Do you smoke, sir? Candidate—I do, sir. Examiner—Have you a spare cigar? Candidate—Yes, sir (extending a short six). Examiner—Now, sir, what is the first duty of a lawyer? Candidate—To collect fees. Examiner—Right; what is the second? Candidate—To increase the number of his clients. Examiner—When does your position towards your client change? Candidate—When making a bill of costs. Examiner—Explain. Candidate—Then we occupy the antagonist's position. I assume the character of plaintiff, and he becomes defendant. Examiner—A suit decided, how can you stand with the lawyer conducting the other bill? Candidate—Cheek by jowl! Examiner—Enough, sir; you promise to be an ornament to your profession, and I wish you success. Now are you aware of the duty you owe me? Candidate—Perfectly. Examiner—Describe the duty. Candidate—It is to invite you to drink. Examiner—But suppose I decline? Candidate (scratching his head)—There is no instance of the kind on the books. I cannot answer the question. Examiner—You are right, and the confidence with which you have made the assertion shows you have read the law attentively; let's take the drink, and I will sign your certificate."—*Western Law Journal*.